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Supreme Court, U.S.
FILED

02 629 OCT 22 2002

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No. _____

In the Supreme Court of the United States

IN RE KATHLEEN G. ARNOVICK,
VALERIE L. COX AND
HENRY B. WANSKER,
Petitioners,

v.

UTAH STATE BAR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED

This case involves a challenge to the July 2000 Bar Examination administered by the Utah State Bar. Unlike virtually any other such challenge, the performance of the Petitioners is not at issue here. Rather, the issues involve fatal defects in the testing protocol employed by the Bar in its Examination. Because of these defects, it was impossible for the July 2000 Examination to serve as a means to ascertain minimum professional competency. Its use by the Utah State Bar to determine licensure resulted in a denial of Due Process to all applicants and a denial of Equal Protection to the Petitioners.

I. Did the Utah State Bar's willful violation of multiple rules, promulgated to circumscribe its conduct in connection with the July 2000 Bar Examination, constitute arbitrary and capricious action resulting in a denial of Fourteenth Amendment Due Process and Equal Protection to the Petitioners?

II. Did the Utah State Bar's administration of a norm-referenced bar examination, which required that a certain percentage of applicants must fail, deny Fourteenth Amendment Due Process and Equal Protection to the Petitioners?

III. Did the Utah State Bar's refusal to provide discovery exclusively within its possession, followed by the Utah Supreme Court's denial of the Petitioners' claims for lack of evidence available only through that discovery, deprive the Petitioners of Fourteenth Amendment Due Process?

PARTIES TO THE PROCEEDING

Petitioner

Petitioners are Kathleen G. Arnovick, Valerie L. Cox and Henry B. Wansker. Plaintiffs have no corporate affiliations.

Respondent

Respondent is the Utah State Bar. Petitioners are unaware of any corporate affiliations.

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OPINION BELOW

The decision of the Utah Supreme Court is officially reported as *In re Arnovick*, 52 P.3d 1246 (Utah 2002).

JURISDICTION

The Supreme Court of the State of Utah rendered a decision on July 26, 2002. It is from that decision, and within ninety days thereof, that discretionary review is timely sought. Jurisdiction is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The federal constitutional provision involved in this case is section 1 of the Fourteenth Amendment to the Constitution of the United States of America, which provides, in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Utah state constitutional provision involved in this case is article VIII, § 4, which provides, in pertinent part:

> The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

STATEMENT OF THE CASE

Procedural History

The Petitioners all sat for the July 2000 Utah State Bar Examination, a state administered professional licensing examination the purpose of which was to test for minimum competency. Petitioners Arnovick and Cox sat for the examination as Student Applicants and Petitioner Wansker sat for the examination as an Attorney Applicant.

The Respondent Utah State Bar, on September 27, 2000, reported to the Petitioners that it had determined that none of them had passed the Examination and refused to accord them licensure. Based upon multiple irregularities in the construction, administration and grading of the Examination, the Petitioners immediately filed separate administrative grievances with the Bar in accordance with promulgated Bar Rules. The Bar's Admissions Committee Panel, on December 29, 2000, recommended to the Bar that the Petitioners' grievances be denied.

The Petitioners asserted the Constitutional issues of Due Process and Equal Protection in a Response to the Admissions Committee Panel's Findings of Fact and Recommendation. App. I at 48a-49a; App. J at 64a-65a; App. K at 80a-81a. Nonetheless, the Bar, through its Executive Committee, adopted the Panel's recommendation on January 19, 2001, without addressing the Constitutional issues raised by Petitioners. Appendices B, C and D. The Utah Supreme Court recognized the Constitutional issues raised by Petitioners, but determined the conduct of the Bar to be excusable. *In re Arnovick*, 52 P.3d 1246, 1250 (Utah 2002). Appendix A at 7a.

Pursuant to the Respondent's Bar Examination Review and Appeal Procedure (Appendix N at 156a-158a), Petitioners timely filed a consolidated, written notice of appeal to the Utah Supreme Court on February 20, 2001. The Utah Supreme Court ordered oral arguments be given in the case and the same were heard on February 4, 2002. On July 26, 2002, the Utah Supreme Court issued a decision denying the Petitoners' claims for relief. From that decision, this Petition for a Writ of Certiorari is filed, based upon issues and arguments set forth hereinafter.

Statement of the Facts

In July 2000, the Utah State Bar administered a test that was to determine the minimum professional competency of those 232 applicants who were then seeking admission as lawyers in that state. The Examination was composed in advance of its administration. The Utah Supreme Court earlier promulgated Rules Governing Admission to the Utah State Bar (Rules) in order to govern Bar conduct. Appendix L at 97a-133a. These rules set forth the manner by which the Examination's twelve essay questions were to have been composed.

On August 18, 2000, the Bar utilized an indeterminate number of people, somewhere between 54 and 86, who took less than 8 hours to grade 2,784 responses to the Examinations' 12 essay questions. The Utah State Bar was to utilize specific grading methodology set forth in its Rules and in its Utah Bar Examiners Committee Grading Handbook (Handbook) (Appendix M at 134a-155a) in order to grade all of these answers. During the grading process, the Bar determined that one of the questions administered in the Examination, a question on the subject of Torts, was improperly constructed and therefore, defective. The question

was omitted from further consideration and the remaining eleven essay questions in the Examination were graded, but with an alteration in the weighting and scoring process to account for the deletion of the Torts question. This alteration did not comport with the requirements of the Bar's Rules.

Rule 7-1 of the Bar's Rules compelled the Bar to administer an examination consisting of twelve essay questions. Rule 7-3 compelled that the adequacy of a Utah-composed essay question must be determined prior to its inclusion in the Examination and gave no authority to those grading the Examination to alter or modify the content of the Examination, much less to delete any question from consideration, regardless of rationale. Rule 7-4 provided that each of the twelve essay questions must be given a mandatory and specific weight within the grading process.

Though the Torts question that was deleted from grading consideration was composed by the Utah State Bar, the Bar did not compose all of the essay questions upon the Examination. Half of the twelve questions appearing were composed by the National Conference of Bar Examiners (NCBE) and were denominated as Mutltistate Essay Examination (MEE) essay questions. The grading methodology prepared and recommended by the NCBE for use in the scoring of NCBE composed essay questions was included in the Handbook. However, the NCBE methodology was facially different from the grading methodology composed by the Utah State Bar, mandated by the Bar's Rules and Handbook and actually used in grading both Bar composed and NCBE composed essay questions. Uncontraverted evidence provided by the Petitioners' expert established that the grading methodology recommended for use by the NCBE was criterion-referenced, whereas the Handbook grading methodology, actually utilized instead by

the Utah State Bar in its grading process on August 18, 2000, was norm-referenced.

As a result of the irregularities in the construction, administration and grading of the essay portion of the July 2000 Utah State Bar Examination and the violations of multiple Bar Rules attendant thereto, the Petitioners asserted that the Examination was incapable of determining minimum professional competency or that is was even susceptible to being graded.

ARGUMENTS FOR GRANTING THE WRIT

I. The Utah State Bar's willful violation of rules promulgated to circumscribe its conduct constituted arbitrary and capricious action resulting in a denial of Due Process and Equal Protection.

A. Due Process

The United States Supreme Court long ago established the law regarding the acceptable parameters ~~of~~ conduct for agents of the government. In the cases of *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L.Ed.2d 1012 (1959) and *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 Ed. 2d 1403 (1957), this Court held that rules which are promulgated for the circumscription of government agency actions may not be ignored or contravened. It is difficult to find more established precedent, yet Utah has now challenged the validity of that precedent with its decision in the instant case. Specifically, the Utah Supreme Court stated:

> Obviously, as an arm of this court, the Bar must do its utmost to adhere to the rules, policies and procedures that we have approved

> for their [sic] governance. When deviations from these rules, policies and procedures occur, it is expected that the Bar will take whatever steps are necessary to insure that such deviations do not occur again in future examinations. However, lapse from strict compliance with the rules and procedures, while certainly a cause for concern on our part, does not automatically mean that the Bar has acted in an arbitrary or unfair manner. *In re Arnovick*, 52 P.3d 1246 at 1250 (Utah 2002).

The Utah Supreme Court in its decision in the case at bar, recognized the Utah State Bar as its agent and as an arm of the Court in assisting the Court in the exercise of its constitutional power to govern the practice of law, pursuant to article VIII, § 4 of the Utah Constitution. App. G at 46a. *In re Arnovick*, 52 P. 3d at 1248. At the same time as it recognized that the Bar performed certain governmental functions, the Utah Supreme Court noted that the Bar was not constituted with the dignity of a full-fledged state administrative agency and as a result, the Bar's actions were not entitled to that deference required be given to the actions of administrative agencies. Instead, the Court noted that while it might indeed give Bar actions deference, it might also disregard them entirely. *Id.*

A fortiori, the Utah State Bar is, at best, equally constrained to follow rules governing its conduct, as must a state administrative agency enabled by legislation. Otherwise, the Utah Supreme Court, as the ultimate arbiter of licensure, could do through an agent that which it could not do itself, i.e., disregard specific rules.

The Utah Administrative Procedures Act provides, in pertinent part, that Utah appellate courts **shall** grant relief in the event an agent acting on behalf of the State violates Rules governing its conduct. Utah Code Ann., Section 63-46b-16(4)(h)(ii). Prior to its decision in the case at bar, the Utah Supreme Court reaffirmed this statement of the Utah Legislature's will. In *State ex rel. Department of Community Affairs v. Utah Merit System Council*, 614 P. 2d 1259, 1263 (Utah 1980), an agency contended that rules governing its conduct were merely guidelines. The Utah Supreme Court held that rules may not be ignored or followed as an agent might elect, but that violations are, in fact, the essence of arbitrariness and capriciousness.

The decision of the Utah Supreme Court in this case will exponentially increase litigation if agencies no longer have to abide by their rules. A number of Utah cases evidence that significant litigation already occurs over agency rules violations. In one such case involving, like the case at bar, the denial of professional licensure, the Utah Court of Appeals held that substantial prejudice to those adversely affected is presumed when rules violations occur. *Krantz v. Utah Department of Commerce, Division of Real Estate, and Utah Real Estate Commission*, 856 P. 2d 369, 371 (Utah App. 1993). Moreover, the Utah Court of Appeals has held that any doubt as to the issue of whether prejudice has occurred must be resolved in favor of the party aggrieved. *Angell v. Board of Review of the Industrial Commission*, 750 P.2d 611, 613 (Utah App.1988).

The specific rules violated by the Utah State Bar were as follows:

a. Rule 7-1 of the Bar's Rules, which required the Bar Examination to consist of 12 essay questions.

b. Rule 7-3 of the Bar's Rules, which required the adequacy of Utah-composed essay questions to be determined prior to their inclusion in the examination, not thereafter.

c. Rule 7-4 of the Bar's Rules, which required the assignment of a mandatory weight for each essay question in the grading process.

d. Section V.D. of the Bar's Grading Handbook, which required a specific and detailed calibration process.

e. Section III.A.(5) of the Bar's Grading Handbook, which stated the required maximum number of issues to be included in each essay question.

f. Section III., introductory paragraph, of the Bar's Grading Handbook, which required that those composing and grading the examination must have demonstrated professional expertise.

The Utah Supreme Court, in its decision, acknowledged that the Utah State Bar comitted an indeterminate number of rules violations in the construction and grading of the examination. It even conceded that Petitioners' criticisms of the Bar's grading procedure were

mathematically convincing. *In re Arnovick*, 52 P.3d at 1249. Notwithstanding these findings, the Utah Supreme Court failed to follow this Court's precedent set forth in *Vitarelli* and *Service*, requiring strict adherence by government agents to the rules circumscribing their conduct.

Without so much as a single citation to authority, the decision of the Utah Supreme Court ignores the will of the Utah Legislature, it flies in the face of years of Utah appellate court precedent and, most importantly, it contravenes the law established by this Court.

B. Equal Protection.

The Petitioners' claim asserting violations of Equal Protection guarantees fundamentally challenges Utah's licensure determination process. It is predicated upon fatal defects in the examination process itself. In the case at bar, the Petitioners were all denied licensure, whereas others similarly situated were not. There was no rational basis for this difference in treatment. As a result, the Petitioners were denied Fourteenth Amendment Equal Protection.

The Utah Supreme Court delegated to the Utah State Bar the duty to differentiate in its treatment of applicants based upon their demonstration of competence. An examination testing for minimal competency would have provided a rational basis for disparate treatment. However, the Bar used an impermissible method of making such a determination. It employed an examination which was neither valid nor reliable. In consequence, its action was arbitrary and capricious. Having used an examination which was defective for its failure to comport with Bar Rules, and which could not measure competency, the Bar lacked any rational

basis by which to make a determination as to who did or did not pass its July 2000 competency examination.

Once aware of its position, the Bar attempted to justify its conduct by seeking a pragmatic rather than a Constitutional solution to the dilemma its Rules violations had created. "Declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later time would have been unduly burdensome and manifestly unfair to the applicants." App. B at 18a; App. C at 27a; App. D at 37a. In other words, the Bar made the determination that a few applicants would bear the burden of its defective examination without regard to considerations of Equal Protection.

A state may require high standards of qualification, such as proficiency in its law, before it admits an applicant to the bar. However, Equal Protection demands that any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Schware v. Board of Bar Examiners*, 352 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). The Utah Supreme Court's contravention of this fundamental and well-settled United Supreme Court precedent signals a likely recurrence of this issue and attendant litigation.

II. The Utah State Bar's use of norm-referenced essay questions in its July 2000 competency examination violated Fourteenth Amendment guarantees of Due Process and Equal Protection.

A. Due Process.

In the case at bar, Petitioners presented uncontradicted evidence establishing that the July 2000 Utah State Bar

Examination was a norm-referenced test. Rule 7-4 of the Bar's Rules Governing Admission to the Utah State Bar (App. L at 114a) mandates that norm-referenced grading methodology be used to grade the essay portion of the examination, as does Section V. F. of the Grading Handbook (App. M at 149a-150a). The only expert evidence of record, the Report of David J. Gustafson (App. O at 159a-171a), characterized the July 2000 Utah Bar Examination as a norm-referenced test and condemned norm-referenced testing as an inappropriate manner in which to test for minimum professional competency.

The Delaware Supreme Court and The Fourth Circuit Court of Appeals have addressed, in the context of bar examinations, the issue of whether or not an examination that purports to have the exclusive purpose of testing for minimum professional competency can be norm-referenced. Both courts concluded, without equivocation, that norm-referenced tests are not proper tests for the determination of minimum professional competency. *Richardson v. McFadden*, 540 F.2d 744, 750 (4th Cir. 1976) and *In re Dennis T. Reardon*, 378 A.2d 614, 618 (Del.1977).

Norm-referenced tests fail to test for minimum professional competency because they compel that at least some of the applicants subjected to the test will fail, regardless of competence. They also compel that some applicants will pass regardless of their competence. The Fourth Circuit, in its cogent criticism of norm-referenced testing, concluded that it would be a matter of sheer chance if a norm-referenced test were to accurately determine competence. *Richardson*, 540 F.2d at 750.

Despite the uncontraverted expert evidence in the record finding fault with norm-referenced grading

methodology and the clear and unambiguous norm-referencing requirements for grading of essay responses set forth in the Utah State Bar's Rules and in its Grading Handbook, the Utah Supreme Court stated that the record "fails to support the [Petitioners'] assertion that the Bar graders 'curved' the examination." *In re Arnovick*, 52 P.3d at 1249. This conclusion is both factually and logically erroneous.

While the Petitioners are aware of the predeliction of this Court to avoid adjudicating factual issues, they are also aware that it will review such determinations in the appropriate instance. The factual error in the case at bar is so egregious as to merit exceptional treatment. The reasons for this are threefold. First, the use of norm-referenced testing in the July 2000 Utah Bar Examination makes that examination an improper vehicle for determination of the minimum professional competence of **any** applicant tested at that time. Second, the requirement under Utah procedures that future bar examinations be norm-referenced assures that **all** licensure determinations made subsequent to the July 2000 Utah Bar Examination will have been arbitrary and capricious. Finally, the Utah Supreme Court's tacit approval of norm-referenced testing methodology, used by its agent, the Utah State Bar, in professional competence examinations, creates a split of authority among the courts which begs for resolution.

B. Equal Protection.

A criterion-referenced test, unlike a norm-referenced test, neither penalizes the competent, nor rewards the deficient. A criterion-referenced test is graded upon fixed performance standards that are established through pre-testing and review by experts. As such, it is designed to determine "minimum competency." Individual performance, not

performance with reference to the group as a whole, is the benchmark of criterion-referenced testing. Report of David J. Gustafson, May 10, 2001. App. O at pp. 162a-163a.

Norm-referenced grading of competency tests, as in the case at bar, will result in a fixed percentage of passing applicants and a fixed percentage of failing applicants, regardless of actual competence. Gustafson Report, May 10, 2001. App. O at pp. 162a-163a. As a result, two applicants could both be competent when measured against the fixed standard, but only one of the applicants would be deemed to have passed the exam under a norm-referenced grading system. When this occurs in the context of a state administered professional licensing examination, those denied licensure are denied Fourteenth Amendment Equal Protection.

As a result of its decision in the case at bar, the Utah Supreme Court has effectively told its bar applicants that it will ration licenses to practice law, with the concomitant effect, intended or otherwise, of restraining trade. The effect of this decision upon other fields of endeavor where licensure is controlled by the State of Utah is obvious. Its effect upon the courts, where aggrieved parties will necessarily seek redress when denied their federal rights, is also self-evident.

III. The Utah State Bar's refusal to provide discovery exclusively within its possession, followed by the Utah Supreme Court's denial of the Petitioners' claims for lack of evidence available only through that discovery, deprived the Petitioners of Fourteenth Amendment Due Process.

In the case at bar, the Petitioners sought, but were denied, discovery from the Utah State Bar as to the following:

a. The process by which the Bar had composed essay questions included in the July 2000 examination:

b. The identity of graders of the examination and their professional qualifications;

c. The training received by those graders;

d. Details regarding required reliability and validity testing performed upon the examination in advance of its administration;

e. The mathematical and statistical protocol employed in the grading process, including scaling of scores; and

f. Raw essay scores and raw Multistate Bar Examination scores for each applicant taking the examination.

Notwithstanding the Petitioners' requests and the Bar's subsequent refusals, the Utah Supreme Court entered adverse findings against the Petitioners based upon their failure to produce evidence. With respect to various allegations, including inadequate drafting of the July 2000 Bar Examination's Torts question, the use of unqualified and/or ill-trained graders to grade the Examination, the use of an improper calibration process in the grading of that examination and improper scaling of raw scores, the Utah Supreme Court stated that "the record contains no evidence." *In re Arnovick*, 52 P.3d at 1249. However, the only evidence available to prove these allegations was solely in the possession of the Utah State Bar and was not disclosed to Petitioners.

In the legally analogous case of *Parrish v. Board of Commissioners*, 533 F.2d 942 (5th Cir. 1976), which involved a civil rights action by aggrieved Alabama Bar applicants who asserted discriminatory grading of their examination papers, the Fifth Circuit ruled that the applicants must be allowed discovery of information from the Bar which could establish a genuine issue of material fact in the face of a Motion for Summary Judgment. The Bar had denied the applicants discovery, contending that it was not guilty of misconduct and asserting that its bald denial of wrongdoing sufficed to prove that point, unless there were independent evidence adduced to the contrary. The Fifth Circuit disagreed, holding that the Bar's position would erect an unreasonable barrier around those in possession of evidence necessary to fair litigation, unjustly compromising the vindication of civil rights. 533 F. 2d at 947.

In *Application of Peterson* 459 P.2d 703 (Alaska 1969), the Supreme Court of Alaska similarly recognized that the fundamental fairness required by Due Process compels the allowance of discovery to aggrieved Bar applicants. In *Peterson*, the Bar had again asserted that only if there were independent evidence of misfeasance or nonfeasance resulting in the applicant's failure should he be granted discovery of evidence sought. The Court dismissed that argument and instead found that since the burden of showing misfeasance or nonfeasance was stringent, an applicant should at least have an opportunity to do so. *Id.* at 711.

The Utah Supreme Court in the case at bar, unlike the courts of these other jurisdictions, has upheld a denial of discovery, while simultaneously penalizing the Petitioners for a purported failure of proof which discovery was intended to provide. By placing the Petitioners in such circumstances, the Utah Supreme court has not merely denied them Due Process,

it has created yet another conflict among the lower courts which begs for resolution.

CONCLUSION

The decision of the Utah Supreme Court contravenes existing United States Supreme Court precedent.

The decision of the Utah Supreme Court diametrically opposes the well-settled precedent set forth in the United States Supreme Court cases of *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L.Ed.2d 1012 (1959) and *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 Ed. 2d 1403 (1957), whereby this Court held that rules which are promulgated for the regulation of government agents may not be ignored or contravened. Further, the decision redefines the meaning of arbitrary and capricious in the context of governmental rules violations. The Utah Supreme Court has determined, *sub silentio*, that Utah agencies, quasi-governmental agencies and agents may now obey rules created to govern their conduct at their option, as long as their actions in violation of those Rules are subjectively determined to be well-intentioned. In effect, in Utah, arbitrariness and capriciousness of governmental and quasi-governmental actions are now to be determined by something other than clear, unambiguous and mandatory rules of conduct.

The Utah Supreme Court has also contravened the well-established precedent set forth in *Schware v. Board of Bar Examiners*, 352 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). If the Utah decision in this case stands, no longer must qualifications for admission to the Bar, and presumably other professional occupations, bear a rational relationship to an applicant's fitness or capacity. This Court must intervene

to require that Utah employ valid and reliable examinations to determine minimum professional competency.

The decision of the Utah Supreme Court contravenes law determining proper testing methodology for professional competency examinations and creates a split of authority that demands reconciliation.

The Fourth Circuit and Delaware Supreme Court have confronted the issue of the propriety of norm-referenced testing as a means to determine minimum professional competency within the legal profession. Each has found the protocol unacceptable and has required instead, criterion-referenced testing. Utah has now tacitly approved the propriety of norm-referenced testing in which success or failure is determined by reference to the overall performance of the test-taking group, rather than in reference to a predetermined standard of performance.

The decision of the Utah Supreme Court denies a party's Due Process right to reasonable discovery necessary to prove facts essential to the claim and creates a split of authority which demands resolution.

The Fifth Circuit and the State of Alaska have both recognized, in cases brought by aggrieved Bar applicants, that if a party to a proceeding is required to present evidence in order to establish facts, that party may not be denied discovery of information in the possession of an adversary where that information is essential to prove those facts. To do so violates the requisites of Due Process. Utah, by virtue of the decision in the instant case, has taken the opposite

position, thereby creating a conflict of authority which begs for resolution.

The effect of the Utah Supreme Court's decision is far-reaching, well beyond its impact upon the Petitioners.

The decision of the Utah Supreme Court creates uncertainty as to the parameters of legitimate conduct by any entity purporting to act as an agent of the State of Utah. It creates uncertainty as to whether or not individuals or other entities who deal with those constituted to act as agents for Utah may rely upon rules promulgated to govern those agents. It creates uncertainty even as to whether Utah regulations will be uniformly enforced.

For future Utah Bar applicants, the Utah Bar and the general public, the impact of the decision of the Utah Supreme Court is profound. The competency of future applicants will not be tested because the Bar continues to use a norm-referenced grading process. As a result, some applicants will surely be accorded licensure in error, just as certainly as others erroneously have been and will be denied it. Further and more perversely, the Utah Bar's competency examination will remain a failure as a vehicle by which to protect either the public or the Bar from the unfit.

For other professions, the effect is merely uncertain. Utah licensing boards, heretofore constrained by appellate court precedent mandating that they abide by rules promulgated to govern their conduct, may now feel free to act in an arbitrary and capricious manner. They may also freely employ norm-referenced testing procedures which only putatively determine minimum competency.

For virtually all litigants, Utah has now established that while one may be expected to present proof, he may no longer be assured of receiving such discovery as is reasonably necessary to present that proof. This creates an environment where the parties to litigation are no longer assured an equal footing under Utah law. The consequences of this inequity are both staggering and appalling.

What is certain is that without a resolution from this Court, the decision of the Utah Supreme Court will likely spawn significant, substantial and necessary litigation. This Court must exercise its plenary power to prevent that result. First, this Court must assert the primacy of its prior judicial precedent that rules promulgated to govern the conduct of those acting as agents of the government must be obeyed. Second, it must resolve the split of authority Utah has created by establishing that no state may legitimately administer a professional licensure examination testing for minimum competency where that test compels that some examined be denied licensure regardless of their competency. Third, it must establish a precedent which guarantees that no party, of whom proof is demanded, will be denied necessary discovery.

For the foregoing reasons, the Petitioners pray that this Court issue a *Writ of Certiorari* to review the decision of the Supreme Court of the State of Utah.

Respectfully submitted, —

Carolyn Montgomery, Esquire
Attorney for Petitioners

APPENDIX A

SUPREME COURT OF UTAH

[Filed July 26, 2002]

No. 20010136

In re Kathleen G. Arnovick, Valerie L. Cox, and Henry B. Wansker, Petitioners.	)))))

JUDGES:
Chief Justice Durham, Associate Chief Justice Durrant, Justice Russon, and Justice Wilkins concur in Justice Howe's opinion.

OPINION

HOWE, Justice:

INTRODUCTION

Petitioners Kathleen G. Arnovick, Valerie L. Cox, and Henry B. Wansker appeal from the findings of fact and final determination of the executive committee of the Utah State Bar denying them admittance to the Bar.

BACKGROUND

Arnovick and Cox as "student applicants" and Wansker as an "attorney applicant" took the July 2000 Utah Bar Examination. All three failed to pass.[1] The examination, as constructed, did not differ from other recent examinations; it contained 200 Multi-state Bar Examination multiple choice questions and 12 essay questions given over a two-day period. Wansker was required to answer only the essay questions. During the grading process, an essay question dealing with tort law was determined to be defective and was not graded. Consequently, each student applicant's final score combined the points they garnered on the Multi-state with the points they earned answering the remaining 11 essay questions.

Upon learning of their failure, Arnovick, Cox, and Wansker separately petitioned the Executive Committee of the Utah State Bar, contending that substantial irregularities in the construction, administration, and grading of the examination process resulted in manifest unfairness and denied them due process and equal protection under the Fourteenth Amendment of the United States Constitution. The Admissions Committee Panel of the Bar considered the petitions and recommended to the Executive Committee that they be denied. Thereafter, petitioners filed responses to the Admission Committee Panel's findings with the Executive Committee. Following an oral hearing, the Executive Committee prepared findings of fact and final determination for each petitioner, denying him or her relief. Sometime during the review process, petitioners learned that the

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[1] Arnovick subsequently took the February 2001 examination, passed it, and was admitted to the Bar.

examinations of five other applicants who had originally failed the examination were re-graded, and those applicants were given passing grades.

Petitioners appeal.

ANALYSIS

I.

Under article VIII, section 4 of the Utah Constitution, this court is empowered to govern the practice of law in Utah, including the admission to practice. *In re Petition of John Randolphseng*, 669 P.2d 400, 401 (Utah 1983). The Board of Bar Commissioners assists us in fulfilling this responsibility, acting as an arm of the court in determining the qualifications and requirements for admission to practice law and in conducting examinations of applicants. *Id.; see also In re Admission of D. Eugene Thorne to the Utah State Bar*, 635 P.2d 22, 23 (Utah 1981). Because the Board of Bar Commissioners acts as our agent, our review of its decisions is not on the same footing as the review of a judgment of a trial court or an administrative agency. We may exercise judgment independent of the Bar Commission whenever we deem it appropriate. *In re Thorne*, 635 P.2d at 23. We have generally chosen, however, to "indulge some deference to its findings and judgments," and have stated that "the Court should not disturb what the Commission has done unless the petitioner clearly demonstrates that he has been treated in an unfair, unreasonable or arbitrary manner." *Id.* Consequently, we review the actions of the Bar and the Bar examination process to determine if they clearly demonstrate that the

petitioners have been treated in an unfair, unreasonable, or arbitrary manner.

Petitioners contend that the Bar has treated them in an unfair and arbitrary manner and urge us to either admit them to the Bar or require all July 2000 Bar applicants to retake the examination. In support of their position, petitioners point to a number of alleged irregularities in the construction, administration, and grading of the examination that they contend contributed to their unfair or arbitrary treatment: (1) the Bar's failure to draft a proper torts question; (2) the Bar's decision not to grade the answers to the improperly drafted torts question; (3) the Bar's assignment to the applicants of identifiable examination numbers; (4) the Bar's utilization of graders who lacked professional expertise; (5) the Bar's use of an insufficient calibration process; (6) the Bar's failure to allocate to the graders a sufficient amount of time to grade the essays; (7) the Bar's use of curving techniques in determining scores; (8) the Bar's over-weighting of the remaining 11 essay questions; (9) the Bar's refusal to grant petitioners' discovery request; (10) the Bar's decision to regrade the examinations of, and subsequently admit, five failing applicants whose scores fell within one point of a passing score.

We have carefully reviewed each of these allegations and find that petitioners have failed to establish that they have been treated in an unfair or arbitrary manner. Petitioners have provided us with an unreviewed and unsubstantiated statistical analysis of the examination, noting that in some instances the Bar did not comply with its operating procedures. They have also speculated that various parts of the examination process might have resulted in arbitrary or unfair treatment.

The irregularities pointed out by petitioners, however, do not convince us that the Bar treated them in an unfair manner. *See Application of Bettine*, 840 P.2d 994, 997 (Ark. 1992) (stating that even though criticisms of grading procedure were convincing from pure mathematical standpoint, they still did not show abuse of discretion). Petitioners do not and cannot demonstrate that the Bar singled them out for unfair treatment. Indeed, it appears that petitioners experienced very little, if anything, not experienced by the other examinees. Every applicant's torts essay was eliminated from the final score; each applicant's examination was subject to the same grading, calibrating, and scoring process; each applicant was able to earn the same amount of total points on the essays, and each applicant's total points earned were scaled to the MBE scores using the same formula; the same review provisions were available to all examinees takers; the Bar regraded the examination of all failing applicants whose scores fell within one point of a passing grade.

Moreover, petitioners fail to demonstrate that they have been treated in an arbitrary manner. To the contrary, the Bar's conduct in relation to the examination appears measured, disciplined, and reasonable given the circumstances. For example, petitioners assert that they may have been injured by the Bar's decision not to grade the torts essay question and by the Bar's grading procedures in general. Before deciding not to grade the torts essay, however, the Bar consulted the grading committee and the Director of Testing for the National Conference of Bar Examiners, evidencing that the Bar's decision was a deliberate and reasoned attempt to preserve the validity of the examination. Before grading the remaining essays, graders

engaged in a calibration process designed to ensure uniformity in the grading process. The record contains no evidence that the graders ignored the calibration techniques, randomly assigned scores, or inaccurately reported those scores. The record also fails to support the assertion that the Bar graders "curved" the examination; the document upon which petitioners base this assertion was completed after the grading was finished and was not used to determine examination scores. Nor does the record show that the scaling of the scores from the 11 essays to the scores from the MBE examination was arbitrary--even if we assume that the scaling resulted in each of the essay questions being worth more than five points, a contention which petitioners have not established.

Petitioners have also enjoyed the benefit of an extensive grievance procedure, including (1) the filing of their complaint, (2) the review of their complaint by the Admissions Committee, together with its findings of fact and recommendations, (3) the petitioners' written response to those findings and recommendations, (4) an oral hearing, and (5) a review and formal findings by the Executive Committee of the Bar. The record indicates that during this process the Bar applied the proper standard for evaluating petitioners' claims, namely, that "relief shall be granted only upon a showing that the petitioner failed the examination because of a substantial irregularity in the administration of the examination, which resulted in the manifest unfairness or because of mathematical inaccuracy in the scoring process." Utah State Bar, Bar Examination Review and Appeal Procedure (1991).

Furthermore, during the review process, pursuant to Bar Admission Rule 11, approved by this court, the Bar made available to petitioners (1) the essay questions, (2) the applicants' answers, and (3) sample answers for each question. Additionally, the Bar made available an outline of Bar examination passing rate data, a copy of the Bar Examination Grievance Appeal Procedure, an article on equating the MBE and essay scores, copies of the ethics question grading sheets, answers and score summaries, a copy of the Bar Examiner Grading Handbook, and a copy of a letter explaining how examinations are scored. Consequently, "we are not persuaded that [petitioners] have been dealt with in such [an arbitrary] or unfair manner that we should interfere with" the ruling of the Executive Committee of the Bar. *In re Thorne*, 635 P.2d at 24.

Obviously, as the arm of this court, the Bar must do its utmost to adhere to the rules, policies, and procedures that we have approved for their governance. When deviations from these rules, policies, and procedures occur, it is expected that the Bar will take whatever steps are necessary to insure that such deviations do not occur again in future examinations. However, lapse from strict compliance with the rules and procedures, while certainly a cause for concern on our part, does not automatically mean that the Bar has acted in an arbitrary or unfair manner.

II.

Closely intertwined--indeed, often overlapping--with petitioners' allegations that the Bar treated them in an unfair and arbitrary manner are their allegations that the Bar has denied them equal protection and due process under the

Fourteenth Amendment of the United States Constitution. Obviously, "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238 (1957). Nevertheless, individuals rarely succeed in arguing that their constitutional rights have been violated by Bar examination procedures. See Thomas J. Goger, Validity Under Federal Constitution of State Bar Examination Procedures, 30 A.L.R. Fed. 934 (1976). The petitioners in this case are no exception.

A. EQUAL PROTECTION

Under the Equal Protection Clause of the Fourteenth Amendment and in the absence of a fundamental right or a protected class, states may treat similarly situated people differently if a reasonable basis exists for doing so. *State v. Herrera*, 1999 Utah 64, P 25, 993 P.2d 854. Petitioners argue that the Bar denied them equal protection when it subsequently regraded the examinations of and awarded passing scores to five other applicants who had originally failed but did not regrade petitioners' examinations. In so doing, the Bar followed the procedure outlined in the Utah Bar Examiner's Committee Grading Handbook, which provides that the Bar shall regrade the essay questions of only those failing applicants whose scores fall within one point of the required minimum passing score. Due to the heavy administrative burdens involved in regrading, this policy is completely reasonable, and consequently the Bar did not violate petitioners' right to equal protection. This practice of the Bar to regrade when an applicant comes within one point of passing is a salutary one and recognizes that grading the

answer to an essay question cannot be done with exact mathematical precision. This practice should be encouraged since it works in favor of the applicants. *Accord Tyler v. Vickery*, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940, 49 L. Ed. 2d 393, 96 S. Ct. 2660 (1976) (stating "it is curious logic to condemn the examiners for utilizing practices designed to recognize the inherent limitations of testing and for attempting to give the benefit of the doubt to applicants who may have been adversely affected by those limitations").

B. SUBSTANTIVE DUE PROCESS

The Due Process Clause of the Fourteenth Amendment allows states to substantively regulate economic rights if such regulation bears a rational relation to a constitutionally permissible objective. *See Ferguson v. Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963) (Harlan, J., concurring); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). Accordingly, a state may "require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar" without violating the Due Process Clause, as long as "any qualification [has] a rational connection with the applicant's fitness or capacity to practice law." *See Schware v. Bd. of Bar Exam'rs*, 353 U.S. at 238; *In re Randolph- Seng*, 669 P.2d at 402. Petitioners argue that the Bar denied them substantive due process through its lack of appropriate appeal procedures and denial of discovery requests. We find nothing, however, to indicate that the Bar procedures, as currently constituted, do not bear a rational relationship with the legitimate objective of regulating the admission to the Bar in

this state and hold therefore that petitioners' right to substantive due process has not been denied.

C. PROCEDURAL DUE PROCESS

The Due Process Clause also imposes constraints on governmental decisions which deprive individuals of liberty or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). Determining the due process required in a given situation demands that we weigh:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *see also V-1 Oil Co. v. Dep't of Envtl. Quality*, 939 P.2d 1192, 1196 (Utah 1997). Relying on these factors, petitioners argue that they have been denied due process because their interest in passing the examination is great, the Bar could easily provide greater procedural protection to petitioners, and the Bar has no legitimate interest other than providing due process to those who take the examination. Our weighing of these factors, however, leads to a different conclusion. In considering the first factor, we

observe that the Bar's decision does not permanently deny petitioners the ability to practice law in Utah; they may retake the examination until they pass it. *See Lucero v. Ogden*, 718 F.2d 355, 359 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035, 79 L. Ed. 2d 706, 104 S. Ct. 1308 (1984) (due process satisfied where applicant had unqualified right to retake examination). Turning to the second factor, we observe, as noted above, that petitioners have received the benefit of an extensive review process culminating in their appearance before this court. Given the extensive nature of this review process, the risk of error in the Bar's decision seems to us to be small and the probable value of additional procedural safeguards would be minimal. *See Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1012, 112 L. Ed. 2d 585, 111 S. Ct. 580 (1990) (allowing applicant to see examination and petition state supreme court for review of denial of admission satisfied due process). Finally, in considering the third factor, we note that the fiscal and administrative costs of imposing any additional procedures on the Bar outweigh the benefit that such procedures could provide, especially given the ever-increasing number of Bar applicants. With these factors clearly in mind, we therefore hold that petitioners in this case enjoyed adequate procedural due process.

CONCLUSION

We are not unaware that a typical Bar applicant sacrifices a great deal of time and energy in preparation for the examination, nor are we unsympathetic to the significant--even painful--personal and professional repercussions that may accompany a failure to pass the examination. Nevertheless, amorphous assertions regarding the unfair

nature of the examination, unaccompanied by supporting evidence, do not establish a violation of constitutional rights or unfair or arbitrary treatment. We therefore affirm the findings of fact and final determinations of the Executive Committee of the Utah State Bar denying petitioners admission to the Bar.

Chief Justice Durham, Associate Chief Justice Durrant, Justice Russon, and Justice Wilkins concur in Justice Howe's opinion.

APPENDIX B

BEFORE THE EXECUTIVE COMMITTEE OF THE UTAH STATE BAR

In Re:	)
	)
Kathleen G. Arnovick,	)
Applicant.	)
	)

FINDINGS OF FACT AND FINAL DETERMINATION

The grievance petition of Kathleen G. Arnovick came before the Bar's Board of Bar Commissioners Executive Committee (the "Committee") on January 8, 2001. The Committee considered the materials submitted by the applicant, The Findings of Fact and Recommendation submitted by the Admissions Committee Panel, the Rules Governing Admission to the Utah State Bar including grievance procedures and the Utah Bar Examiner Committee Grading Handbook.

Background

Petitioner, Kathleen G. Arnovick, sat for the July 2000 Utah State Bar examination (the "July Exam") as a Student Applicant. She received a scaled (equated) score on the Multistate Bar Examination ("MBE") of 126 and a raw essay score of 23. After scaling and averaging, her final combined (weighted) score was 126.39. A total combined

(weighted) score of 130.0 is required for Student Applicants to pass the examination.

The bar examination is designed to be reliable, valid, fair and efficient. The July Exam consisted of 12 essay questions, but one of the questions, the Torts question, was not considered in the final examination scores.

Petitioner's Claims

Ms. Arnovick asserts that the scoring of the examination was not conducted properly because the Torts question, which was one of the 12 essay questions, was improperly excluded from the calculation of her score. She also asserts that the preparation of the essays, grading of the essay answers, and uniformity of grading, was generally improper which constituted a substantial irregularity in the administration of the exam. Finally, she asserts that the grading of one of her 12 essay answers (the Ethics question) was incorrect which constituted mathematical inaccuracy in the scoring process.

Context of Rules and Findings of Fact

1. Rule 11-2 of the Rules Governing Admission and the duly authorized Bar Examination Review and Appeal Procedure governing appeals from failures to pass the Utah State Bar examination allow for grievances to be reviewed only on the basis of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process.

2. The Rules Governing Admission and the grievance procedures do not provide for the *re-reading* of individual essay answers of an applicant. Ms. Arnovick's answer to the Ethics questions was not re-read.

3. The duly authorized Utah Bar Examiners Committee Grading, Handbook, however, provides for automatic *reappraisal* grading in certain instances as follows: Reappraisal grading is used to confirm the essay scores of those applicants who fail in a range just below the passing score. The passing score for the bar examination is a weighted average score of 130. Applicants whose weighted average score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers re-graded. The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second reader assigns the same raw score as the first reader, that is the score for the answer. If the raw score assigned by the second reader differs from that assigned by the first reader, the two scores will be averaged together and the averaged score will be the final raw essay score. This score is the raw score assigned to the applicant.

4. The average passing combined (weighted) score for all applicants taking the July Exam was 147.69. Ms. Arnovick's final combined (weighted) score was 126.39. By virtue of this score the applicant's answers do not qualify for reappraisal.

5. The average scaled (equated) MBE score of all the applicants taking the July Exam was 144.17. Ms. Arnovick's scaled (equated) MBE score was 126.

6. The average raw score of all applicant answers to the essay portion of the July Exam was 28.96. Ms. Arnovick's raw essay score was 23.

7. After all essay questions are graded, the applicants' raw scores are scaled to the MBE portion of the examination. Scaling creates comparable numeric scores on the essay and MBE portions of the standard examination. MBE equated scores and essay scaled scores are combined for Student Applicants according to the standard deviation method and compared to the passing benchmark of 130. Applicants who receive a combined score of 130 or above pass the bar examination.

8. The procedure followed by the Bar staff in transferring scores from the scoring sheets to the records of each applicant involves no fewer than three separate operations performed by two different individuals in order to check for accuracy. In Ms. Arnovick's case, the records reflect that her scores were accurately transferred from the scoring sheets to her test record.

9. The prior bar examination format that was amended in 1991, required that applicants pass at least 12 of 18 essays. The bar examination was three days in duration, rather than the two-day format that exists today. One of the primary reasons for specifying that numerous essay questions be included in the examination is to define a basis for the examination's statistical reliability. That is, in order to assure that qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects. An examination

consisting of 11 graded essay questions out of 12 essay questions is not a substantial irregularity in the administration of the examination which resulted in manifest unfairness and does not create mathematical inaccuracy in the scoring process nor is it fatal to the examination's statistical reliability.

10. According to the scoring information provided to Ms. Arnovick, the Torts question was excluded from the calculation of the score for the examination. The Grading Committee assigned to grade the Torts question conducted the scoring calibration process to assure the statistical validity of the question. In this process, each member of the Grading Committee reads five of the same answers to the question being graded and then discusses the answers and grading of each, as a group. After completing that process and while reviewing several other answers, the Committee concluded that the Torts question was not fairly assessing the knowledge of the applicants. As a result, the decision was made to not grade the question because it lacked statistical validity.

11. The Bar's Rules Governing Admission provide that 12 essay questions shall be included in the examination. Twelve questions were included in the examination but as discussed above, the Torts question was eliminated from scoring because it was deemed to lack statistical validity. At the point the Torts question was determined to be defective, the examination was over. As a practical matter, the Bar had three choices: (a) declare the examination invalid and require applicants to re-take the test, most likely at the next regularly scheduled examination seven months later; (b) admit everyone who took the examination regardless of their performance; or

(c) eliminate the statistically invalid question and score the remainder of the examination.

12. Declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later time would have been unduly burdensome and manifestly unfair to the applicants. Also, invalidating an entire examination would have been relinquishing the Bar's responsibility to administer the examination. Admitting everyone who took the examination regardless of their performance would have been an abdication of the Bar's fundamental obligation to ensure competency and abdication of the public trust. The Torts Grading Subcommittee, the Admission Administrator, and the Bar's General Counsel, in conjunction with the National Conference of Bar Examiners, determined that discarding the defective question was the most acceptable and least problematic resolution.

13. The Utah Bar Examination Committee Grading Handbook in conjunction with the Rules Governing Admission provide guidelines for the preparation of the essays, grading of the essay answers and uniformity of grading. No departure from these guidelines alleged by Ms, Arnovick, would, if proven, constitute a substantial irregularity in the administration of the examination which resulted in manifest unfairness or mathematical inaccuracy in the scoring process.

14. The overall pass rate for the July Exam was 87.9%. This pass rate is well within the range of pass rates over the past ten years, which has been as low as 79.4% in February 1999 and as high as 94.1% in July 1998. The

average pass rate for the 20 examinations given over the past ten years is 87.85%. The fact that the overall pass rate on the July Exam did not significantly deviate from prior examination pass rates demonstrates that there was no substantial irregularity in the administration of the examination which resulted in manifest unfairness nor mathematical inaccuracy in the scoring process.

15. Ms. Arnovick's relatively low score on the MBE portion of the examination was a determining factor in her overall failing score.

16. Ms. Arnovick has failed to sufficiently demonstrate by her performance on the July Exam that she has the ability to identify legal issues, to engage in a reasoned analysis of those issues and to arrive at a logical solution by application of fundamental legal principles which demonstrate her thorough understanding of these legal principles.

Conclusions and Final Determination

1. There is no evidence of mathematical inaccuracy in the scoring process or that the written procedures governing the grading process were not substantially followed.

2. At the point the Torts question was determined to be statistically invalid, the examination was over. The Bar chose the most acceptable and least problematic but practical solution. Elimination of the Torts question did not constitute a substantial irregularity in the administration of the examination resulting in manifest unfairness.

3. The Rules Governing Admission and the grievance procedures do not provide for re-reading of essay answers. Furthermore, the Committee finds that if answers to particular questions were re-read upon an applicant's mere request and not based on the grounds set forth in the appeal procedures, failing applicants would be able to endlessly request re-reading of their answers.

4. Uniformity in grading by the same grading panels is essential to the statistical integrity of the exam. Uniformity in grading is destroyed if answers are re-read. The reappraisal process provides an adequate safeguard for re-consideration of applicant essay answers,

5. Ms. Arnovick's final score of 126.39 does not qualify for reappraisal grounds set forth in the Utah State Bar Examiners Committee Grading Handbook. There is no basis for re-reading or reappraisal of the applicant's answer to the Ethics question.

6. Ms. Arnovick did not pass the July Exam.

For the foregoing reasons, the Committee denies Ms. Arnovick's petition.

DATED this 19th day of January, 2001.

/s/ _____
David Nuffer on behalf of the
Executive Committee

Findings of Fact and Final Determination of the Executive Committee of the Utah State Bar, In re Arnovick

CERTIFICATE OF SERVICE

On the 19th day of January, 2001, the undersigned hereby certifies that a true and correct copy of the foregoing Findings of Fact and Final Determination for Kathleen G. Arnovick was hand delivered to the following:

Carolyn Montgomery
Attorney at Law
1904 Longview Drive
Salt Lake City, Utah 84124

DATED this 19th day of January, 2001.

/s/ _____
Phyllis Yardley

APPENDIX C

BEFORE THE EXECUTIVE COMMITTEE OF THE UTAH STATE BAR

In Re:	)
	)
Valerie L. Cox,	)
Applicant.	)
	)

FINDINGS OF FACT AND FINAL DETERMINATION

The grievance petition of Valerie L. Cox came before the Bar's Board of Bar Commissioners Executive Committee (the "Committee") on January 8, 2001. The Committee considered the materials submitted by the applicant, the Findings of Fact and Recommendation submitted by the Admissions Committee Panel, the Rules Governing Admission to the Utah State Bar including grievance procedures and the Utah Bar Examiner Committee Grading Handbook.

Background

Petitioner, Valerie L. Cox, sat for the July 2000 Utah State Bar examination (the "July Exam") as a Student Applicant. She received a scaled (equated) score on the Multistate Bar Examination ("MBE") of 123 and a raw essay score of 25. After scaling and averaging, her final combined (weighted) score was 127.81. A total combined (weighted)

score of 130.0 is required for Student Applicants to pass the examination.

The bar examination is designed to be reliable, valid, fair and efficient. The July Exam consisted of 12 essay questions, but one of the questions, the Torts question, was not considered in the final examination scores.

Petitioner's Claims

Ms. Cox asserts that the scoring of the examination was not conducted properly because the Torts question, which was one of the 12 essay questions, was improperly excluded from the calculation of her score. She also asserts that the preparation of the essays, grading of the essay answers, and uniformity of grading, was generally improper which constituted a substantial irregularity in the administration of the exam. Finally, she asserts that the grading of one of her 12 essay answers (the Ethics question) was incorrect which constituted mathematical inaccuracy in the scoring process.

Context of Rules and Findings of Fact

1. Rule 11-2 of the Rules Governing Admission and the duly authorized Bar Examination Review and Appeal Procedure governing appeals from failures to pass the Utah State Bar examination allow for grievances to be reviewed only on the basis of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process.

2. The Rules Governing Admission and the grievance procedures do not provide for the *re-reading* of individual essay answers of an applicant. Ms. Cox's answer to the Ethics question was not re-read.

3. The duly authorized Utah Bar Examiners Committee Grading Handbook provides for automatic *reappraisal* grading in certain instances as follows: Reappraisal grading is used to confirm the essay scores of those applicants who fail in a range just below the passing score. The passing score for the bar examination is a weighted average score of 130. Applicants whose weighted average score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers re-graded. The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second reader assigns the same raw score as the first reader, that is the score for the answer. If the raw score assigned by the second reader differs from that assigned by the first reader, the two scores will be averaged together and the averaged score will be the final raw essay score. This score is the raw score assigned to the applicant.

4. The average passing combined (weighted) score for all applicants taking the July Exam was 147.69. Ms. Cox's final combined (weighted) score was 127.81. By virtue of this score the applicant's answers do not qualify for reappraisal.

5. The average scaled (equated) MBE score of all the applicants taking the July Exam was 144.17. Ms. Cox's scaled (equated) MBE score was 123.

6. The average raw score of all applicant answers to the essay portion of the July Exam was 28.96. Ms. Cox's raw essay score was 25.

7. After all essay questions are graded, the applicants' raw scores are scaled to the MBE portion of the examination. Scaling creates comparable numeric scores on the essay and MBE portions of the standard examination. MBE equated scores and essay scaled scores are combined for Student Applicants according to the standard deviation method and compared to the passing benchmark of 130. Student Applicants who achieve a 130 combined score or above pass the examination.

8. The procedure followed by the Bar staff in transferring scores from the scoring sheets to the records of each applicant involves no fewer than three separate operations performed by two different individuals in order to check for accuracy. In Ms. Cox's case, the records reflect that her scores were accurately transferred from the scoring sheets to her test record.

9. The prior bar examination format that was amended in 1991, required that applicants pass at least 12 of 18 essays. The bar examination was three days in duration, rather than the two-day format that exists today. One of the primary reasons for specifying that numerous essay questions be included in the examination is to define a basis for the examination 's statistical reliability. That is, in order to assure that qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects. An examination

consisting of 11 graded essay questions out of 12 essay questions is not a substantial irregularity in the administration of the examination which resulted in manifest unfairness and does not create mathematical inaccuracy in the scoring process nor is it fatal to the examination's statistical reliability.

10. According to the scoring information provided to Ms. Cox, the Torts question was excluded from the calculation of the score for the examination. The Grading Committee assigned to grade the Torts question conducted the scoring calibration process to assure the statistical validity of the question. In this process, each member of the Grading Committee reads five of the same answers to the question being graded and then discusses the answers and grading of each, as a group. After completing that process and while reviewing several other answers, the Grading Committee concluded that the Torts question was not fairly assessing the knowledge of the applicants. As a result, the decision was made to not grade the question because it lacked statistical validity.

11. The Bar's Rules Governing Admission provide that 12 essay questions shall be included in the examination. Twelve questions were included in the examination but as discussed above, the Torts question was eliminated from scoring because it was deemed to lack statistical validity. At the point the Torts question was determined to be defective, the examination was over. As a practical matter, the Bar had three choices: (a) declare the examination invalid and require applicants to re-take the test, most likely at the next regularly scheduled examination seven months later; (b) admit everyone

who took the examination regardless of their performance; or (c) eliminate the statistically invalid question and score the remainder of the examination.

12. Declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later time would have been unduly burdensome and manifestly unfair to the applicants. Also invalidating an entire examination would have been relinquishing the Bar's responsibility to administer the examination. Admitting everyone who took the examination regardless of their performance would have been an abdication of the Bar's fundamental obligation to ensure competency and abdication of the public trust. The Torts Grading Subcommittee, the Admission Administrator, and the Bar's General Counsel, in conjunction with the National Conference of Bar Examiners, determined that discarding the defective question was the most acceptable and least problematic resolution.

13. The Utah Bar Examination Committee Grading Handbook in conjunction with the Rules Governing Admission provide guidelines for the preparation of the essays, grading of the essay answers and uniformity of grading. No departure from these guidelines alleged by Ms. Cox, would, if proven, constitute a substantial irregularity in the administration of the examination which resulted in manifest unfairness or mathematical inaccuracy in the scoring process.

14. The overall pass rate for the July Exam was 87.9%. This pass rate is well within the range of pass rates over the past ten years, which has been as low as 79.4% in

February 1999 and as high as 94.1% in July 1998. The average pass rate for the 20 examinations given over the past ten years is 87.85%. The fact that the overall pass rate on the July Exam did not significantly deviate from prior examination pass rates demonstrates that there was no substantial irregularity in the administration of the examination which resulted in manifest unfairness nor mathematical inaccuracy in the scoring process.

15. Ms. Cox's relatively low score on the MBE portion of the examination was a determining factor in her overall failing score.

16. Ms. Cox failed to sufficiently demonstrate by her performance on the July Exam that she has the ability to identify legal issues, to engage in a reasoned analysis of those issues and to arrive at a logical solution by application of fundamental legal principles which demonstrate her thorough understanding of these legal principles.

Conclusions and Final Determination

1. There is no evidence of mathematical inaccuracy in the scoring process or that the written procedures governing the grading process were not substantially followed.

2. At the point the Torts question was determined to be statistically invalid, the examination was over. The Bar chose the most acceptable and least problematic but practical solution. Elimination of the Torts question did not constitute

a substantial irregularity in the administration of the examination resulting in manifest unfairness.

3. The Rules Governing Admission and the grievance procedures do not provide for re-reading of essay answers. Furthermore, the Committee finds that if answers to particular questions were re-read upon an applicant's mere request and not based on the grounds set forth in the rules and appeal procedures, failing applicants would be able to endlessly request re-reading of their answers.

4. Uniformity in grading by the same grading panels is essential to the statistical integrity of the exam. uniformity in grading is destroyed if answers are re-read. The reappraisal process provides an adequate safeguard for reconsideration of applicant essay answers.

5. Ms. Cox's final score of 127.81 does not qualify for reappraisal grounds set forth in the Utah State Bar Examiners Committee Grading, Handbook.

6. There is no basis for re-reading or reappraisal of the applicant's answer to the Ethics question.

7. Ms. Cox did not pass the July Exam.

For the foregoing reasons, the Committee denies Ms. Cox's petition.

Findings of Fact and Final Determination of the Executive Committee of the Utah State Bar, In re Cox

DATED this 19th day of January, 2001.

/s/ _____
David Nuffer on behalf of the
Executive Committee

Findings of Fact and Final Determination of the Executive Committee of the Utah State Bar, In re Cox

CERTIFICATE OF SERVICE

On the 19th day of January, 2001, the undersigned hereby certifies that a true and correct copy of the foregoing Findings of Fact and Final Determination for Valerie L. Cox was hand delivered to the following:

Carolyn Montgomery
Attorney at Law
1904 Longview Drive
Salt Lake City, Utah 84124

DATED this 19th day of January, 2001.

/s/ _____
Phyllis Yardley

APPENDIX D

BEFORE THE EXECUTIVE COMMITTEE OF THE UTAH STATE BAR

In Re:	)
	)
Henry B. Wansker,	)
Applicant.	)
	)

FINDINGS OF FACT AND FINAL DETERMINATION

The grievance petition of Henry B. Wansker came before the Bar's Board of Bar Commissioner's Executive Committee (the "Committee") on January 8, 2001. The Committee considered the materials submitted by the applicant, the Findings of Fact and Recommendation submitted by the Admissions Committee Panel, the Rules Governing Admission to the Utah State Bar including grievance procedures and the Utah Bar Examiner Committee Grading Handbook.

Background

Petitioner, Henry B. Wansker, sat for the July 2000 Utah State Bar examination (the "July Exam") as an Attorney Applicant. He received a raw essay score of 21. His scaled (converted) essay score was 120.94. A total scaled essay score of 130.0 is required for Attorney Applicants to pass the examination.

The bar examination is designed to be reliable, valid, fair and efficient. The July Exam consisted of 12 essay questions, but one of the questions, the Torts question, was not considered in the final examination scores.

Petitioner's Claims

Mr. Wansker asserts that the scoring of the examination was not conducted properly because the Torts question, which was one of the 12 essay questions, was improperly excluded from the calculation of his score. He also asserts that the preparation of the essays, the grading of the essay answers, and the uniformity of grading, was generally improper which constituted a substantial irregularity in the administration of the exam and mathematical inaccuracy. He also asserts that the anonymity of one's attorney status is adversely impacted by the Bar's test identification numbering system that assigns Attorney Applicants a different series of numbers from the Student Applicants. Finally, he asserts that by "arbitrarily" assigning Attorney Applicants a Multistate Bar Examination ("MBE") score of 130 in the process to arrive at the final score, Attorney Applicants are prejudiced. That is, he claims that if 144.17, the average of all applicants' MBE scores on the July Exam, was arbitrarily assigned to all Attorney Applicants instead of the 130 MBE score, and if the resulting combined score was used to evaluate Attorney Applicants, he would have passed the July Exam.

Findings of Fact and Final Determination of the Executive Committee of the Utah State Bar, In re Wansker

Context of Rules and Findings of Fact

1. Rule 11-2 of the Rules Governing Admission and the duly authorized Bar Examination Review and Appeal Procedure governing the Utah State Bar examination allow for grievances to be reviewed only on the basis of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process.

2. The Rules Governing Admission and the grievance procedures do not provide for the *re-reading* of individual essay answers of an applicant. Mr. Wansker's essay answers were not re-read.

3. The duly authorized Utah Bar Examiners Committee Grading Handbook, however, provides for automatic *reappraisal* grading in certain instances as follows: Reappraisal grading is used to confirm the essay scores of those applicants who fail in a range just below the passing score. The passing score for the bar examination is a weighted average score of 130. Applicants whose weighted average score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers re-graded. The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second reader assigns the same raw score as the first reader, that is the score for the answer. If the raw score assigned by the second reader differs from that assigned by the first reader, the two scores will be averaged together and the averaged score will be the final raw essay score. This score is the raw score assigned to the applicant.

4. The average passing combined (weighted) score for all applicants taking the July Exam was 147.69. Mr. Wansker's final scaled essay score was 120.94. By virtue of this score the applicant's answers do not qualify for reappraisal.

5. The average raw score of all the applicant answers to the essay portion of the July Exam was 28.96. Mr. Wansker's raw essay score was 21.

6. After all essay questions are graded, the applicants' raw essay scores are scaled to the MBE portion of the examination. Scaling creates comparable numeric scores on the essay and MBE portions of the standard examination. MBE equated scores and essay scaled scores are combined for Student Applicants according to the standard deviation method, and compared to the passing benchmark of 130. Student Applicants who receive a combined weighted score of 130 or above pass the bar examination. Attorney Applicants, however, do not take the MBE portion of the examination. Attorney Applicants are only required to achieve a scaled essay score of 130 to pass the bar examination. While combined scores are printed on the form letters sent both to the Attorney and Student Applicants and on internal bar forms, these combined scores are inapplicable to Attorney Applicants.

7. The procedure followed by the Bar staff in transferring scores from the scoring sheets to the records of each applicant involves three separate operations performed by two different individuals in order to check for accuracy. In Mr. Wansker's case, the records reflect that his scores were

accurately transferred from the scoring sheets to his test record.

8. The prior bar examination format, that was amended in 1991, required that applicants pass at least 12 of 18 essays, and was three days in duration, rather than the two-day format that exists today. One of the primary reasons for specifying that numerous essay questions be included in the examination is to define a basis for the examination's statistical reliability. That is, in order to assure that qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects. An examination consisting of 11 graded essay questions out of 12 essay questions is not a substantial irregularity in the administration of the examination which resulted in manifest unfairness and does not create mathematical inaccuracy in the scoring process nor is it fatal to the examination's statistical reliability.

9. According to the scoring information provided to Mr. Wansker, the Torts question was excluded from the calculation of the score for the examination. The Grading Committee assigned to grade the Torts question conducted the scoring calibration process to assure the statistical validity of the question. In this process, each member of the Grading Committee reads five of the same answers to the question being graded and then discusses the answers and grading of each, as a group. After completing that process and while reviewing several other answers, the Committee concluded that the Torts question was not fairly assessing the knowledge of the applicants. As a result, the decision was made to not grade the question because it lacked statistical validity.

10. The Bar's Rules Governing Admission provide that 12 essay questions shall be included in the examination. Twelve questions were included in the examination but as discussed above, the Torts question was eliminated from scoring because it was deemed to lack statistical validity. At the point the Torts question was determined to be defective, the examination was over. As a practical matter, the Bar had three choices: (a) declare the examination invalid and require applicants to re-take the test, most likely at the next regularly scheduled examination seven months later; (b) admit everyone who took the examination regardless of their performance; or (c) eliminate the statistically invalid question and score the remainder of the examination.

11. Declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later time would have been unduly burdensome and manifestly unfair to the applicants. Also, invalidating an entire examination would have been relinquishing the Bar's responsibility to administer the examination. Admitting everyone who took the examination regardless of their performance would have been an abdication of the Bar's fundamental obligation to ensure competency and abdication of the public trust. The Torts Grading Subcommittee, the Admission Administrator, and the Bar's General Counsel, in conjunction with the National Conference of Bar Examiners, determined that discarding the defective question was the most acceptable and least problematic resolution.

12. The Utah Bar Examination Committee Grading Handbook in conjunction with the Rules Governing Admission provide guidelines for the preparation of the

essays, grading of the essay answers and uniformity of grading. No departure from these guidelines alleged by Mr. Wansker, would, if proven, constitute a substantial irregularity in the administration of the examination which resulted in manifest unfairness or mathematical inaccuracy in the scoring process.

13. The overall pass rate for the July Exam was 87.9%. This pass rate is well within the range of pass rates over the past ten years, which has been as low as 79.4% in February 1999 and as high as 94.1% in July 1998. The average pass rate for the 20 examinations given over the past ten years is 87.85%. The fact that the overall pass rate on the July Exam did not significantly deviate from prior examination pass rates demonstrates that there was no substantial irregularity in the administration of the examination which resulted in manifest unfairness nor mathematical inaccuracy in the scoring process.

14. All applicants are assigned numbers that are used to track them throughout the application and examination process that provides anonymity that would not be possible if their names were used. Student Applicants are assigned numbers beginning with 1000 and Attorney Applicants are assigned numbers beginning with 3000. The number series bifurcation is done for internal administrative reasons unrelated to grading, e.g., charges and fees.

15. The graders of the bar examination are not provided with any information to indicate that the 1000 series of applicants are Student Applicants and that the 3000 series of applicants are Attorney Applicants. The Bar's practice for

assigning a different series of numbers to the Student and Attorney Applicants has been in place for approximately ten years. During that period of time, in most instances, the Attorney Applicants have performed better and had a higher pass rate than the Student Applicants.

16. Attorney Applicants are not required to take the MBE portion of the examination. In the past, if an attorney (an applicant licensed to practice in a sister jurisdiction) has wanted to take the two-day student examination, which includes the MBE, the applicant has applied as a Student Applicant. There are no rules that would prohibit an out-of-state licensed attorney from applying as a Student Applicant unless they do not meet the required qualifications. Most out-of-state licensed attorneys, however, prefer taking the abbreviated one-day examination which does not include the MBE.

17. Because of computer limitations requiring a number to be filled into the MBE field on the record of each applicant, the admissions staff has filled in that field on the record of Attorney Applicants with a 130, the score required to pass the bar examination. The National Conference of Bar Examiners which scales essay scores for the Bar also requires that the "dummy" score be filled into each Attorney Applicant's record. An individual Attorney Applicant's scaled essay score, however, is not combined with the "dummy" 130 MBE score for any evaluative purpose. Specifically, it is not relevant or used in determining if the Attorney Applicant has achieved a passing score. Attorney Applicants are only required to achieve a scaled essay score of 130 to pass the bar examination. There is, in fact, no negative or positive effect

from recording a dummy 130 MBE score in the record of Attorney Applicants.

18. Mr. Wansker has failed to sufficiently demonstrate by his performance on the July Exam that he has the ability to identify legal issues, to engage in a reasoned analysis of those issues and to arrive at a logical solution by application of fundamental legal principles which demonstrate his thorough understanding of these legal principles.

Conclusions and Final Determination

1. There is no evidence of mathematical inaccuracy in the scoring process or that the written procedures governing the grading process were not substantially followed.

2. At the point the Torts question was determined to be statistically invalid, the examination was over. The Bar chose the most acceptable and least problematic but practical solution. The elimination of the Torts question was not a substantial irregularity in the administration of the examination resulting in manifest unfairness.

3. The Rules Governing Admission and the grievance procedures do not provide for re-reading of essay answers. Furthermore, the Committee finds that if answers to particular questions were re-read upon an applicant's mere request and not based on the grounds set forth in the rules and appeal procedures, failing applicants would be able to endlessly request re-reading of their answers.

4. Uniformity in grading by the same grading panels is essential to the statistical integrity of the examination. Uniformity in grading is destroyed if answers are re-read. The reappraisal process provides an adequate safeguard for re-consideration of applicant essay answers.

5. Mr. Wansker's scaled essay score of 120.94 does not qualify for reappraisal grounds set forth in the Utah State Bar Examiners Committee Grading Handbook.

6. There is no basis for re-reading or reappraisal of the applicant's essays answers.

7. There is no evidence that the assignment of a different series of test identification numbers to Attorney Applicants adversely affects the Attorney Applicants. The practice has been in place for approximately ten years and Attorney Applicants more often than not have a higher pass rate than Student Applicants. Furthermore, the grading of essays is governed by guidelines that are designed to eliminate subjectivity on behalf of any individual grader.

8. Assigning Attorney Applicants an imputed MBE score of 130 for purposes of scaling the essay answers of the examination to the MBE does not disadvantage Attorney Applicants. There is, in fact, no negative or positive effect from recording a dummy 130 MBE score in the record of Attorney Applicants.

9. Mr. Wansker did not pass the July Exam.

For the foregoing reasons, the Committee denies Mr. Wansker's petition.

DATED this 19th day of January, 2001.

/s/ _____
David Nuffer on behalf of the
Executive Committee

Findings of Fact and Final Determination of the Executive Committee of the Utah State Bar, In re Wansker

CERTIFICATE OF SERVICE

On the 19th day of January, 2001, the undersigned hereby certifies that a true and correct copy of the foregoing Findings of Fact and Final Determination for Henry B. Wansker was hand delivered to the following:

Carolyn Montgomery
Attorney at Law
1904 Longview Drive
Salt Lake City, Utah 84124

DATED this 19th day of January, 2001.

/s/ _____
Phyllis Yardley

APPENDIX E

U.S. CONSTITUTION
AMEND. 14
SECTION 1 (2002)

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

28 U.S.C.S. § 1257 (2002)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX G

UTAH CONSTITUTION
ARTICLE VIII
SECTION 4

Sec. 4. [Rule-making power of Supreme Court – Judges pro tempore – Regulation of practice of law.]

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of tow-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

APPENDIX H

UTAH ADMINISTRATIVE PROCEDURES ACT

Utah Code Ann. § 63-46b-16(4)(h)(ii):

> (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: ...
>
> (h) the agency action is: ...
>
> (ii) contrary to a rule of the agency;

APPENDIX I

Carolyn Montgomery
1904 Longview Drive
Salt Lake City, Utah 84124
(801) 278-3301
Fax (801) 278-7767

Attorney for Petitioner

BEFORE THE BOARD OF COMMISSIONERS
UTAH STATE BAR

In re	)
	)
Kathleen G. Arnovick	)
	)

RESPONSE TO ADMISSIONS COMMITTEE PANEL'S FINDINGS OF FACT AND RECOMMENDATION

Petitioner responds to the Admissions Committee Panel's Findings of Fact and Recommendation as follows:

PETITIONER'S CLAIMS

Petitioner concurs with the Admissions Committee Panel's (ACP) recitation of Petitioner's claims for relief except insofar as the ACP fails to characterize said claims as including allegations of denials of Equal Protection and Due

Process under the Fourteenth Amendment to the Constitution of the United States.

FINDINGS OF FACT

1. Petitioner does notdispute Finding of Fact # 1. However, Petitioner does assert that the lack of a clearly defined, written grievance procedure to supplement and/or explicate the Bar Examination Review and Appeal Procedure (Revised March, 1991) attached hereto as Exhibit 1, denies Due Process in that it allows Respondent arbitrarily to determine the nature and scope of review, if any, of grievances filed and does not allow for the review of grades improperly assigned to Bar applicants in violation of Bar grading guidelines.

2. Petitioner does not dispute the ACP's Finding of Fact #2 insofar as it accurately recites Rule V. H of the Respondent's Grading Handbook (Handbook).

3. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 3, that the average combined (weighted) **passing** score for all passing applicants was 147.69, nor has Petitioner been provided with said score for **all** applicants.

4. Petitioner disputes the statement by the ACP in Finding of Fact # 4 that the average scaled (equated) MBE score of all applicants taking the July 2000 Utah Bar Examination ("Exam") was 144.17. Attached hereto as Appendix A is a Summary of Mathematical and Statistical Discrepancies that lists the various inconsistent scores

provided by Respondent in its discovery responses. Petitioner has been provided two different numbers purporting to be the correct average scaled MBE score on five different occasions. Further, there is no indication as to whether or not the various average scaled MBE scores provided to Petitioner were computed utilizing only student applicant scores or if they included MBE scores arbitrarily assigned to attorney applicants.

5. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 5 that the average raw score for all applicants taking the Exam was 28.96. Petitioner does not dispute that a raw essay score of 21 was assigned to her. However, Petitioner asserts that her raw essay score was not determined in compliance with either the requirements of the Handbook or with the Due Process and Equal Protection mandates of the Fourteenth Amendment to the Constitution of the United States in the following respects:

a. The calibration process actually utilized for grading of answers to the Exam is set forth in a letter from Katherine A. Fox, General Counsel to the Utah State Bar ("General Counsel") to Petitioner's counsel, dated December 14, 2000, and provided pursuant to Petitioner's discovery requests and attached hereto as Exhibit 2. Yet that described process differs substantially from the process mandated to be employed by graders in Rules V. B and D of the Handbook;

b. The graders of the Ethics Question required Petitioner and all applicants to identify and analyze

nine separate issues in response to the Ethics Question. See Letter from General Counsel to Petitioner's counsel dated December 1, 2000, and attachments thereto, provided pursuant to Petitioner's discovery requests and attached hereto as Exhibit 3. However, Rule III A. 5 of the Handbook states that a " .. question should include no more than three or four issues...". The Model Ethics Answer, provided by Respondent and attached hereto as Exhibit 4, contains only four issues for identification and analysis. The Model Answer to the Criminal Law Question similarly violates this Rule in that this Answer contains ten issues for analysis. Petitioner asserts that either or both of these Rules violations, alone, or in combination with other similar violations that may have occurred elsewhere in the grading of the Exam, result in scoring that is fatally flawed;

c. Rule III of the Handbook compels the Respondent to utilize graders "... selected on the basis of **demonstrated professional expertise** (emphasis added)." This mandate is reiterated in the Introduction of the Handbook, which provides: "'The Bar utilizes the services of **expert** (emphasis added) graders to grade the essay answers." To date, Respondent has failed and refused to respond to Petitioner's discovery request to identify these experts or to provide evidence of their expertise. Respondent, in Exhibit 2, pages one and two, indicates that "...14 grading subcommittees... (composed of)... between four and six graders per subcommittee participated..." in the grading of the Exam. In effect, an indeterminate number of graders (between fifty-six and eighty-four),

with indeterminate qualification as "experts" were employed to grade the Exam,

d. Petitioner incorporates by reference and reasserts those allegations set forth in paragraph two of her Amended Petition for Relief. Petitioner further alleges that the Handbook, Rule V. F establishes a mandatory grading scale which, by definition, compares applicants' responses to those of each other, rather than to a preestablished objective grading standard. In effect, competence is determined not objectively by comparing to the standard, but through subjective comparison to the performance of the test taking group;

e. Respondent, through discovery, has admitted on page three of Exhibit 2, that "... answers [to Exam essay questions] undergo a 'bell-curve' process when the grading is complete so that an average 'answer' is given a score of "3.'" In other words, Respondent admits to compression of grades into a predetermined format which, by definition, compels that some applicants fail the Exam, there being the implicit requirement that there be accorded not only "A's" but "'F's." A perfect answer becomes merely an average answer if all applicants are extraordinarily capable in their responses. An objectively adequate answer similarly can become anomalously substandard. Under such a system, there is no objective criterion employed by which to determine adequacy. Under such circumstances, any examination, and in particular, this Exam, ceases to be a means by which to test for minimum competency and becomes instead,

a tool by which to eliminate applicants and to illegally restrain competition;

f. Respondent, through discovery, has admitted on pages one and two of Exhibit 2, that two hundred thirty-two examinations were graded between the hours of 8:00 a.m. and 5:00 p.m. on August 18, 2000. Somewhere between fifty-six and eighty-four putatively "expert" graders were employed in the process. Subcommittees of between four and six persons "spent (differing amounts of) time.., in the grading process for a variety of reasons, including but not limited to the number of graders who were available. We simply have no way of ascertaining how much time any particular subcommittee spent on grading individual exam answers." During this indeterminate amount of time, these graders graded up to two thousand seven hundred eighty-four responses, each of which was expected to reflect the thoughtful work of one-half hour by each applicant. Further, each subcommittee spent a differing and indeterminate portion of the total time allotted for grading in calibration of Exam answers, anywhere from one to three hours. Presumably food was necessarily consumed at some point, if not calls of nature heeded. Under the best of circumstances, it strains credulity to assert that grading was or could be either uniform, consistent or nondiscriminatory, there having been available as little as six minutes per grader to devote to the duties of reading multiple issue (up to nine or more) answers, of analyzing those answers, of comparing answers scored with frequent reference to "benchmark papers" (Handbook Rule V. E. 1.) and of

recording the same, without error, upon grading sheets;

g. Respondent's General Counsel has notified Petitioner, through Counsel, that sub-issue grading sheets regarding the Exam's Ethics Question were in the possession of graders and not the Respondent when requested through discovery, some several months after grading was completed. This breach of security violates the provisions of Handbook Rule V. E. and may well have been repeated with respect to other Exam questions, as may be determined by further discovery. Alone or in combination with similar breaches, if any, this Rules violation fatally compromises the integrity of the Exam.

6. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 6 that Petitioner's scores were accurately transferred from scoring sheets to her test record.

7. With respect to the ACP Finding of Fact # 7, Petitioner does not contest that "…. the Torts question was excluded from the calculation of the score of the examination…" by the Grading Committee. However, the stated reason for excluding the Torts question, that "there were too few issues," is inconsistent with the reasons previously provided by Bar personnel. Despite putatively having been reviewed for competency, the question was deemed incompetent and statistically invalid by the Grading Committee, without consultation or input from a psychometrician or other qualified expert.

8. In response to the ACP's Finding of Fact # 8, Petitioner admits that her raw essay scores were, in some manner, scaled to the MBE portion of the examination; that MBE equated scores and essay scaled scores were in some manner combined; and that applicants receiving a weighted score of at least 130 were deemed to have passed the Exam. However, Petitioner emphatically denies that the manner in which Exam scores were scaled enhanced the validity of the scores in that:

a. Numerous statistical and mathematical inconsistencies, inaccuracies and errors in Respondent's own data, including data used to compute the Standard Deviation Formula, render the scoring and scaling of the Exam invalid. A summary of these inconsistencies, inaccuracies and errors is set forth in Appendix A attached hereto;

b. Respondent has provided no evidence that scaling protects against intentional bias in the grading and scoring of examinations such as the Exam. For example, if despite objectively adequate and responsive answers to examination questions, a grader were, for reasons of bias, to assign substandard scores or scores of zero, scaling would in fact, exacerbate rather than ameliorate the detrimental effects of such illegal conduct; and

c. As asserted in Petitioner's Petition for Review, the deletion of an essay question from the Exam caused the remaining questions to be given a raw weight in excess of that permitted by Rule 7-4 of the Rules Governing Admission to the Utah State Bar

("Rules") in the process of scaling the essay portion of the Exam to the MBE. This Rules violation rendered the scaling of the essay portion of the Exam fatally flawed.

9. Petitioner, in response to the ACP's Findings of Fact # 9-13, asserts that elimination of one of the 12 essay questions from consideration in the grading and scoring of the Exam is not, as the ACP implies, a *de minimus* violation of the Rules, for the following reasons:

a. Petitioner and others similarly situated were deprived of time to accrue points on the eleven remaining questions which would have been available had the Exam not been defective;

b. Failure to have graded twelve essay questions is fatal to the validity of the Exam because it requires that a greater raw weight be accorded the remaining eleven questions in the scaling of the essay portion of the Exam to the MBE's two hundred points, in contravention of the Rules and the Handbook;

c. The ACP's own analysis in Finding of Fact # 10 suggests that in order to allow that "...qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects... and .. to enhance the examination's statistical reliability..." the examination should include twelve questions as, indeed, current Rules **compel**; and

d. Petitioner was denied an opportunity to accrue points which others might not have accrued. The ACP's "re-scoring" of Petitioner's examination by according **all** applicants a score of five points upon the defective and deleted examination question does not accurately or in a statistically valid manner credit Petitioner with points which he was deprived the opportunity to accrue, since to accord all applicants five points has the net effect of giving **none** to any applicant. Since it is impossible to remedy this loss in a manner consistent with Due Process and Equal Protection, the Exam itself is rendered fatally defective. The results of the Exam must be vacated or all applicants must be deemed to have passed the same.

Petitioner contends that the ACP's assertion of the *non sequitur* that, in effect, eleven really equals twelve even if one began with twelve, is not merely illogical, but completely contravenes the Rules. Rule 7-1 of the Rules states that "'the essay portion of the examination **shall** consist of twelve questions." This language is clearly mandatory and not permissive. The violation of this rule is both legally and actually substantive, prejudicial and alone, invalidates the results of the Exam. It is noteworthy that in re-scoring Petitioner's Exam by giving all applicants five additional points, the ACP tacitly admits the impropriety of having denied Petitioner the opportunity to accrue points toward passage of the Exam.

The ACP suggests that were there "... a significant deviation in the appropriate procedures in preparation of the essays, grading of the essay answers and uniformity of

grading, there would be a significant deviation in the overall pass rate for the examination." This argument is not syllogistic, reaches the unfounded conclusion that violation of Rule 7-1, however flagrant, is superfluous and suggests a predisposition on the part of the ACP to preserve "inviolate" the results of the Exam, regardless of the consequences.

Petitioner also disputes the APC's assertion in Findings # 12 that Petitioner's relatively low score on the MBE portion of the Exam was a determining factor in her overall failing rate. Petitioner has requested information through discovery that will, upon information and belief, show that applicants scoring at or below Petitioner's MBE score did in fact receive a passing score on the Exam.

10. Petitioner, in response to the ACP's Finding of Fact # 14, refers the Commissioners to the Summary of Mathematical and Statistical Discrepancies attached hereto as Appendix A. This Chart illustrates that Respondent has provided to Petitioner two different pass rates in three different formats.

11. Petitioner responds to the ACP's Finding of Fact # 15 first, by incorporating and re-assenting those arguments made above, and second, by asserting that because of the numerous defects in the composition, administration and grading of the Exam, the Exam was not and could not be an accurate indicator of Petitioner's competency.

12. Although the ACP referred to Petitioner's claim regarding the improper scoring of her Ethics Question in its preliminary statement of Petitioner's Claims, it failed entirely to discuss the claim on its merits and did not resolve

the allegations of the claim in its Findings of Fact and Recommendations.

The Handbook explicitly states in Rule V. F. that "... if the examinee has shown any understanding of the question and has made a serious attempt to at least try to answer it, that examinee should not receive a grade of "0." The Ethics Grading Committee totally ignored this rule and arbitrarily assigned a "0" to answers which included from 1 to 3 issues. See, Exhibit 1, specifically the attachments to the letter from General Counsel wherein the Ethics Grading Committee created a "bell curve". Petitioner not only discussed multiple issues, but did so in a manner responsive to the question posed. The Ethics Question and Petitioner' s Answer thereto are attached hereto as Exhibit 9. Further, as discussed more fully in paragraph 5.b. above, the Ethics Question contained nine issues which constitutes an additional violation of the requirements contained in the Handbook.

The Handbook states in Rule V. G. that "... unless bar examination graders adhere to the established grading system, a fair and accurate evaluation of applicant performance on the examination is impossible." Accordingly, the assignment of a "0" grade to Petitioner's responsive Ethics answer does not represent a fair and accurate evaluation of Petitioner's performance on the Exam and therefore such a grade is manifestly unfair.

PRAYER FOR RELIEF

Petitioner would reiterate that she is entitled to relief in the form of a vacation of the scores of all applicants who took the July 2000 Bar Examination and the re-administration

of the Examination to all in accordance with the applicable governing Rules and in a non-discriminatory manner. In the alternative, Petitioner asserts that she is entitled to be deemed to have passed the Examination as were others deemed to have passed, in spite of the defective composition, administration and grading described above. Due Process and Equal Protection of the law mandated by the Fourteenth Amendment to the Constitution of the United States, require no less.

DATED this 5th day of January, 2001.

/s/ _____
Carolyn Montgomery
Attorney for Petitioner

Response to Admissions Committee Panel's Findings of Fact and Recommendation - Arnovick

APPENDIX "A"

SUMMARY OF MATHEMATICAL AND STATISTICAL DISCREPANCIES

Number of Applicants Taking 2000 Bar Examination

232	2000 Bar Examination Results; Exhibit 5
235	Letter from General Counsel dated 12-1-00, attachment on Ethics bell curve; Exhibit 3

Number of Applicants Passing the 2000 Bar Examination

199	Standard Deviation Formula; included as an attachment to Letter from General Counsel dated 11-16-2000; Exhibit 6
204	Findings of Fact and Recommendation
204	Pass List for the 2000 Examination posted on the Utah State Bar Web Site, dated October 13, 2000
203	Pass List for the 2000 Examination posted on the Utah State Bar Web Site, Amended October 17, 2000

204	2000 Bar Examination Results; Exhibit 5

Percentage of Passing Applicants

85.78% (199 out of 232)	Standard Deviation Formula; included as an attachment to Letter from General Counsel dated 11-16-2000; Exhibit 6
87.9% (204 out of 232)	2000 Bar Examination Results; Exhibit 5
87.9%	Findings of Fact and Recommendation

Average MBE Score for All Applicants

144.17	Findings of Fact and Recommendation
144.17	Standard Deviation Formula; included as an attachment to Letter from General Counsel dated 11-16-2000; Exhibit 6
144.17	Letter from General Counsel dated 11-22-00 Exhibit 7

145.57	Letter from Admissions Administrator dated 10-4-00; Exhibit 8
145.57	2000 Bar Examination Results; Exhibit 5

Range of Scaled MBE Scores

108.63 to 175.70	Letter from Admissions Administrator dated 10-4-00; Exhibit 8
108.00to 181.00	2000 Bar Examination Results; Exhibit 5
108.00to 175.00	Letter from General Counsel dated 11-22-00 Exhibit 7

APPENDIX J

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Attorney for Petitioner

BEFORE THE BOARD OF COMMISSIONERS
UTAH STATE BAR

In re	)
	)
Valerie L. Cox	)
	)

RESPONSE TO ADMISSIONS COMMITTEE PANEL'S FINDINGS OF FACT AND RECOMMENDATION

Petitioner responds to the Admissions Committee Panel's Findings of Fact and Recommendation as follows:

PETITIONER'S CLAIMS

Petitioner concurs with the Admissions Committee Panel's (ACP) recitation of Petitioner's claims for relief except insofar as the ACP fails to characterize said claims as including allegations of denials of Equal Protection and Due

Process under the Fourteenth Amendment to the Constitution of the United States.

FINDINGS OF FACT

1. Petitioner does notdispute Finding of Fact # 1. However, Petitioner does assert that the lack of a clearly defined, written grievance procedure to supplement and/or explicate the Bar Examination Review and Appeal Procedure (Revised March, 1991) attached hereto as Exhibit 1, denies Due Process in that it allows Respondent arbitrarily to determine the nature and scope of review, if any, of grievances filed and does not allow for the review of grades improperly assigned to Bar applicants in violation of Bar grading guidelines.

2. Petitioner does not dispute the ACP's Finding of Fact #2 insofar as it accurately recites Rule V. H of the Respondent's Grading Handbook (Handbook).

3. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 3, that the average combined (weighted) **passing** score for all passing applicants was 147.69, nor has Petitioner been provided with said score for **all** applicants.

4. Petitioner disputes the statement by the ACP in Finding of Fact # 4 that the average scaled (equated) MBE score of all applicants taking the July 2000 Utah Bar Examination ("Exam") was 144.17. Attached hereto as Appendix A is a Summary of Mathematical and Statistical Discrepancies that lists the various inconsistent scores

provided by Respondent in its discovery responses. Petitioner has been provided two different numbers purporting to be the correct average scaled MBE score on five different occasions. Further, there is no indication as to whether or not the various average scaled MBE scores provided to Petitioner were computed utilizing only student applicant scores or if they included MBE scores arbitrarily assigned to attorney applicants.

5. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 5 that the average raw score for all applicants taking the Exam was 28.96. Petitioner does not dispute that a raw essay score of 21 was assigned to her. However, Petitioner asserts that her raw essay score was not determined in compliance with either the requirements of the Handbook or with the Due Process and Equal Protection mandates of the Fourteenth Amendment to the Constitution of the United States in the following respects:

a. The calibration process actually utilized for grading of answers to the Exam is set forth in a letter from Katherine A. Fox, General Counsel to the Utah State Bar ("General Counsel") to Petitioner' s counsel, dated December 14, 2000, and provided pursuant to Petitioner's discovery requests and attached hereto as Exhibit 2. Yet that described process differs substantially from the process mandated to be employed by graders in Rules V. B and D of the Handbook;

b. The graders of the Ethics Question required Petitioner and all applicants to identify and analyze

nine separate issues in response to the Ethics Question. See Letter from General Counsel to Petitioner's counsel dated December 1, 2000, and attachments thereto, provided pursuant to Petitioner's discovery requests and attached hereto as Exhibit 3. However, Rule III A. 5 of the Handbook states that a " .. question should include no more than three or four issues...". The Model Ethics Answer, provided by Respondent and attached hereto as Exhibit 4, contains only four issues for identification and analysis. The Model Answer to the Criminal Law Question similarly violates this Rule in that this Answer contains ten issues for analysis. Petitioner asserts that either or both of these Rules violations, alone, or in combination with other similar violations that may have occurred elsewhere in the grading of the Exam, result in scoring that is fatally flawed;

c. Rule III of the Handbook compels the Respondent to utilize graders "... selected on the basis of **demonstrated professional expertise** (emphasis added)." This mandate is reiterated in the Introduction of the Handbook, which provides: "'The Bar utilizes the services of **expert** (emphasis added) graders to grade the essay answers." To date, Respondent has failed and refused to respond to Petitioner's discovery request to identify these experts or to provide evidence of their expertise. Respondent, in Exhibit 2, pages one and two, indicates that "...14 grading subcommittees... (composed of)... between four and six graders per subcommittee participated..." in the grading of the Exam. In effect, an indeterminate number of graders (between fifty-six and eighty-four),

with indeterminate qualification as "experts" were employed to grade the Exam,

d. Petitioner incorporates by reference and reasserts those allegations set forth in paragraph two of her Amended Petition for Relief. Petitioner further alleges that the Handbook, Rule V. F establishes a mandatory grading scale which, by definition, compares applicants' responses to those of each other, rather than to a preestablished objective grading standard. In effect, competence is determined not objectively by comparing to the standard, but through subjective comparison to the performance of the test taking group;

e. Respondent, through discovery, has admitted on page three of Exhibit 2, that "... answers [to Exam essay questions] undergo a 'bell-curve' process when the grading is complete so that an average 'answer' is given a score of '3.'" In other words, Respondent admits to compression of grades into a predetermined format which, by definition, compels that some applicants fail the Exam, there being the implicit requirement that there be accorded not only "A' s" but "'F' s.'" A perfect answer becomes merely an average answer if all applicants are extraordinarily capable in their responses. An objectively adequate answer similarly can become anomalously substandard. Under such a system, there is no objective criterion employed by which to determine adequacy. Under such circumstances, any examination, and in particular, this Exam, ceases to be a means by which to test for minimum competency

and becomes instead, a tool by which to eliminate applicants and to illegally restrain competition;

f. Respondent, through discovery, has admitted on pages one and two of Exhibit 2, that two hundred thirty-two examinations were graded between the hours of 8:00 a.m. and 5:00 p.m. on August 18, 2000. Somewhere between fifty-six and eighty-four putatively "expert" graders were employed in the process. Subcommittees of between four and six persons "spent (differing amounts of) time... in the grading process for a variety of reasons, including but not limited to the number of graders who were available. We simply have no way of ascertaining how much time any particular subcommittee spent on grading individual exam answers." During this indeterminate amount of time, these graders graded up to two thousand seven hundred eighty-four responses, each of which was expected to reflect the thoughtful work of one-half hour by each applicant. Further, each subcommittee spent a differing and indeterminate portion of the total time allotted for grading in calibration of Exam answers, anywhere from one to three hours. Presumably food was necessarily consumed at some point, if not calls of nature heeded. Under the best of circumstances, it strains credulity to assert that grading was or could be either uniform, consistent or nondiscriminatory, there having been available as little as six minutes per grader to devote to the duties of reading multiple issue (up to nine or more) answers, of analyzing those answers, of comparing answers scored with frequent reference to "benchmark papers" (Handbook Rule V. E. 1.) and of

recording the same, without error, upon grading sheets;

g. Respondent's General Counsel has notified Petitioner, through Counsel, that sub-issue grading sheets regarding the Exam's Ethics Question were in the possession of graders and not the Respondent when requested through discovery, some several months after grading was completed. This breach of security violates the provisions of Handbook Rule V. E. and may well have been repeated with respect to other Exam questions, as may be determined by further discovery. Alone or in combination with similar breaches, if any, this Rules violation fatally compromises the integrity of the Exam.

6. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 6 that Petitioner's scores were accurately transferred from scoring sheets to her test record.

7. With respect to the ACP Finding of Fact # 7, Petitioner does not contest that" .... the Torts question was excluded from the calculation of the score of the examination..." by the Grading Committee. However, the stated reason for excluding the Torts question, that "'there were too few issues," is inconsistent with the reasons previously provided by Bar personnel. Despite putatively having been reviewed for competency, the question was deemed incompetent and statistically invalid by the Grading Committee, without consultation or input from a psychometrician or other qualified expert.

Response to Admissions Committee Panel's Findings of Fact and Recommendation - Cox

8. In response to the ACP's Finding of Fact # 8, Petitioner admits that her raw essay scores were, in some manner, scaled to the MBE portion of the examination; that MBE equated scores and essay scaled scores were in some manner combined; and that applicants receiving a weighted score of at least 130 were deemed to have passed the Exam. However, Petitioner emphatically denies that the manner in which Exam scores were scaled enhanced the validity of the scores in that:

a. Numerous statistical and mathematical inconsistencies, inaccuracies and errors in Respondent's own data, including data used to compute the Standard Deviation Formula, render the scoring and scaling of the Exam invalid. A summary of these inconsistencies, inaccuracies and errors is set forth in Appendix A attached hereto;

b. Respondent has provided no evidence that scaling protects against intentional bias in the grading and scoring of examinations such as the Exam. For example, if despite objectively adequate and responsive answers to examination questions, a grader were, for reasons of bias, to assign substandard scores or scores of zero, scaling would in fact, exacerbate rather than ameliorate the detrimental effects of such illegal conduct; and

c. As asserted in Petitioner's Petition for Review, the deletion of an essay question from the Exam caused the remaining questions to be given a raw weight in excess of that permitted by Rule 7-4 of the Rules Governing Admission to the Utah State Bar

("Rules") in the process of scaling the essay portion of the Exam to the MBE. This Rules violation rendered the scaling of the essay portion of the Exam fatally flawed.

9. Petitioner, in response to the ACP's Findings of Fact # 9-13, asserts that elimination of one of the 12 essay questions from consideration in the grading and scoring of the Exam is not, as the ACP implies, a *de minimus* violation of the Rules, for the following reasons:

a. Petitioner and others similarly situated were deprived of time to accrue points on the eleven remaining questions which would have been available had the Exam not been defective;

b. Failure to have graded twelve essay questions is fatal to the validity of the Exam because it requires that a greater raw weight be accorded the remaining eleven questions in the scaling of the essay portion of the Exam to the MBE's two hundred points, in contravention of the Rules and the Handbook;

c. The ACP's own analysis in Finding of Fact # 10 suggests that in order to allow that "...qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects... and .. to enhance the examination's statistical reliability..." the examination should include twelve questions as, indeed, current Rules **compel**; and

d. Petitioner was denied an opportunity to accrue points which others might not have accrued. The ACP's "re-scoring" of Petitioner's examination by according **all** applicants a score of five points upon the defective and deleted examination question does not accurately or in a statistically valid manner credit Petitioner with points which he was deprived the opportunity to accrue, since to accord all applicants five points has the net effect of giving **none** to any applicant. Since it is impossible to remedy this loss in a manner consistent with Due Process and Equal Protection, the Exam itself is rendered fatally defective. The results of the Exam must be vacated or all applicants must be deemed to have passed the same.

Petitioner contends that the ACP's assertion of the *non sequitur* that, in effect, eleven really equals twelve even if one began with twelve, is not merely illogical, but completely contravenes the Rules. Rule 7-1 of the Rules states that "'the essay portion of the examination **shall** consist of twelve questions." This language is clearly mandatory and not permissive. The violation of this rule is both legally and actually substantive, prejudicial and alone, invalidates the results of the Exam. It is noteworthy that in re-scoring Petitioner's Exam by giving all applicants five additional points, the ACP tacitly admits the impropriety of having denied Petitioner the opportunity to accrue points toward passage of the Exam.

The ACP suggests that were there "... a significant deviation in the appropriate procedures in preparation of the essays, grading of the essay answers and uniformity of

grading, there would be a significant deviation in the overall pass rate for the examination." This argument is not syllogistic, reaches the unfounded conclusion that violation of Rule 7-1, however flagrant, is superfluous and suggests a predisposition on the part of the ACP to preserve "inviolate" the results of the Exam, regardless of the consequences.

Petitioner also disputes the APC's assertion in Findings # 12 that Petitioner's relatively low score on the MBE portion of the Exam was a determining factor in her overall failing rate. Petitioner has requested information through discovery that will, upon information and belief, show that applicants scoring at or below Petitioner's MBE score did in fact receive a passing score on the Exam.

10. Petitioner, in response to the ACP's Finding of Fact # 14, refers the Commissioners to the Summary of Mathematical and Statistical Discrepancies attached hereto as Appendix A. This Chart illustrates that Respondent has provided to Petitioner two different pass rates in three different formats.

11. Petitioner responds to the ACP's Finding of Fact # 15 first, by incorporating and re-assenting those arguments made above, and second, by asserting that because of the numerous defects in the composition, administration and grading of the Exam, the Exam was not and could not be an accurate indicator of Petitioner's competency.

12. Although the ACP referred to Petitioner's claim regarding the improper scoring of her Ethics Question in its preliminary statement of Petitioner's Claims, it failed entirely to discuss the claim on its merits and did not resolve

the allegations of the claim in its Findings of Fact and Recommendations.

The Handbook, in Rule V.F., sets forth the grading scale to be used on the essay questions of the Exam. The grading scale spans from "0" to "5" and the Rule includes a description and explanation of the use of the scale: "A 1 answer demonstrates little understanding of the facts or law and little ability to reason to a conclusion." Petitioner was assigned a score of 1 on her Ethics Question even though she correctly identified and discussed four of the nine issues required by the Ethics Grading Committee. The Ethics Grading Committee totally ignored this rule by arbitrarily assigning a "1" to Petitioner's answer that contained an correct discussion of four issues. See, Exhibit 1, specifically the attachments to the letter from General Counsel wherein the Ethics Grading Committee created a "bell curve". The Ethics Question and Petitioner's Answer thereto are attached hereto as Exhibit 9. Further, as discussed more fully in paragraph 5.b. above, the Ethics Question contained nine issues which constitutes an additional violation of the requirements contained in the Handbook.

The Handbook states in Rule V. G. that "... unless bar examination graders adhere to the established grading system, a fair and accurate evaluation of applicant performance on the examination is impossible." Accordingly, the assignment of a "1" grade to Petitioner's responsive Ethics answer does not represent a fair and accurate evaluation of Petitioner's performance on the Exam and therefore such a grade is manifestly unfair.

PRAYER FOR RELIEF

Petitioner would reiterate that she is entitled to relief in the form of a vacation of the scores of all applicants who took the July 2000 Bar Examination and the re-administration of the Examination to all in accordance with the applicable governing Rules and in a non-discriminatory manner. In the alternative, Petitioner asserts that she is entitled to be deemed to have passed the Examination as were others deemed to have passed, in spite of the defective composition, administration and grading described above. Due Process and Equal Protection of the law mandated by the Fourteenth Amendment to the Constitution of the United States, require no less.

DATED this 5th day of January, 2001.

/s/ _____
Carolyn Montgomery
Attorney for Petitioner

Response to Admissions Committee Panel's Findings of Fact and Recommendation - Cox

APPENDIX "A"

SUMMARY OF MATHEMATICAL AND STATISTICAL DISCREPANCIES

Number of Applicants Taking 2000 Bar Examination

232	2000 Bar Examination Results; Exhibit 5
235	Letter from General Counsel dated 12-1-00, attachment on Ethics bell curve; Exhibit 3

Number of Applicants Passing the 2000 Bar Examination

199	Standard Deviation Formula; included as an attachment to Letter from General Counsel dated 11-16-2000; Exhibit 6
204	Findings of Fact and Recommendation
204	Pass List for the 2000 Examination posted on the Utah State Bar Web Site, dated October 13, 2000
203	Pass List for the 2000 Examination posted on the Utah State Bar Web Site, Amended October 17, 2000

204	2000 Bar Examination Results; Exhibit 5

Percentage of Passing Applicants

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Average MBE Score for All Applicants

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Response to Admissions Committee Panel's Findings of Fact and Recommendation - Cox

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Range of Scaled MBE Scores

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108.00to 181.00	2000 Bar Examination Results; Exhibit 5
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APPENDIX K

Carolyn Montgomery
1904 Longview Drive
Salt Lake City, Utah 84124
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Fax (801) 278-7767

Attorney for Petitioner

BEFORE THE BOARD OF COMMISSIONERS
UTAH STATE BAR

In re	)
	)
Henry B. Wansker	)
	)

RESPONSE TO ADMISSIONS COMMITTEE PANEL'S FINDINGS OF FACT AND RECOMMENDATION

Petitioner responds to the Admissions Committee Panel's Findings of Fact and Recommendation as follows:

PETITIONER'S CLAIMS

Petitioner concurs with the Admissions Committee Panel's (ACP) recitation of Petitioner's claims for relief except insofar as the ACP fails to characterize said claims as including allegations of denials of Equal Protection and Due

Process under the Fourteenth Amendment to the Constitution of the United States.

FINDINGS OF FACT

1. Petitioner does notdispute Finding of Fact # 1. However, Petitioner does assert that the lack of a clearly defined, written grievance procedure to supplement and/or explicate the Bar Examination Review and Appeal Procedure (Revised March, 1991) attached hereto as Exhibit 1, denies Due Process in that it allows Respondent arbitrarily to determine the nature and scope of review, if any, of grievances filed and does not allow for the review of grades improperly assigned to Bar applicants in violation of Bar grading guidelines.

2. Petitioner does not dispute the ACP's Finding of Fact #2 insofar as it accurately recites Rule V. H of the Respondent's Grading Handbook (Handbook).

3. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 3, that the average combined (weighted) **passing** score for all passing applicants was 147.69, nor has Petitioner been provided with said score for **all** applicants. Moreover, Petitioner has been provided with conflicting information as to the average scaled MBE score of those taking the July 2000 Utah Bar Examination (Exam) making it impossible to determine the accuracy of the information. Attached hereto as Appendix A is a Summary of Mathematical and Statistical Discrepancies that lists the various inconsistent scores provided by Respondent in its discovery responses. Petitioner has been

provided two different numbers purporting to be the correct average scaled MBE score on five different occasions. Further, there was no indication as to whether or not the various average scaled MBE scores provided to Petitioner were computed utilizing only student applicant scores or if they included MBE scores arbitrarily assigned to attorney applicants.

4. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 4 that the average raw score for all applicants taking the Exam was 28.96. Petitioner does not dispute that a raw essay score of 21 was assigned to him. However, Petitioner asserts that his raw essay score was not determined in compliance with either the requirements of the Handbook or with the Due Process and Equal Protection mandates of the Fourteenth Amendment to the Constitution of the United States in the following respects:

a. The calibration process actually utilized for grading of answers to the Exam is set forth in a letter from Katherine A. Fox, General Counsel to the Utah State Bar ("General Counsel") to Petitioner's counsel, dated December 14, 2000, provided pursuant to Petitioner's discovery requests and attached hereto as Exhibit 2. Yet that described process differs substantially from the process mandated to be employed by graders in Rules V. B and D of the Handbook;

b. The graders of the Ethics Question required Petitioner and all applicants to identify and analyze nine separate issues in response to the Ethics

Question. See Letter from General Counsel to Petitioner's counsel dated December 1, 2000, and attachments thereto, provided pursuant to Petitioner's discovery requests and attached hereto as Exhibit 3. However, Rule III A. 5 of the Handbook states that a " .. question should include no more than three or four issues...". The Model Ethics Answer, provided by Respondent and attached hereto as Exhibit 4, contains only four issues for identification and analysis. The Model Answer to the Criminal Law Question similarly violates this Rule in that this Answer contains ten issues for analysis. Petitioner asserts that either or both of these Rules violations, alone, or in combination with other similar violations that may have occurred elsewhere in the grading of the Exam, result in scoring that is fatally flawed;

c. Rule III of the Handbook compels the Respondent to utilize graders "... selected on the basis of **demonstrated professional expertise** (emphasis added)." This mandate is reiterated in the Introduction of the Handbook, which provides: "'The Bar utilizes the services of **expert** (emphasis added) graders to grade the essay answers." To date, Respondent has failed and refused to respond to Petitioner's discovery request to identify these experts or to provide evidence of their expertise. Respondent, in Exhibit 2, pages one and two, indicates that "...14 grading subcommittees... (composed of)... between four and six graders per subcommittee participated..." in the grading of the Exam. In effect, an indeterminate number of graders (between fifty-six and eighty-four),

with indeterminate qualification as "experts" were employed to grade the Exam;

d. Petitioner incorporates by reference and reasserts those allegations set forth in paragraph two of his Petition for Relief filed with Respondent on October 23, 2000. Petitioner further alleges that the Handbook, Rule V. F establishes a mandatory grading scale which, by definition, compares applicants' responses to those of each other, rather than to a preestablished objective grading standard. In effect, competence is determined not objectively by comparing to the standard, but through subjective comparison to the performance of the test taking group;

e. Respondent, through discovery, has admitted on page three of Exhibit 2, that "... answers [to Exam essay questions] undergo a 'bell-curve' process when the grading is complete so that an average 'answer' is given a score of '3.'" In other words, Respondent admits to compression of grades into a predetermined format which, by definition, compels that some applicants fail the Exam, there being the implicit requirement that there be accorded not only "A" s" but "F' s." A perfect answer becomes merely an average answer if all applicants are extraordinarily capable in their responses. An objectively adequate answer similarly can become anomalously substandard. Under such a system, there is no objective criterion employed by which to determine adequacy. Under such circumstances, any examination, and in particular, this Exam, ceases to

be a means by which to test for minimum competency and becomes instead, a tool by which to eliminate applicants and to illegally restrain competition;

f. Respondent, through discovery, has admitted on pages one and two of Exhibit 2, that two hundred thirty-two examinations were graded between the hours of 800 a.m. and 5:00 p.m. on August 18, 2000. Somewhere between fifty-six and eighty-four putatively "expert" graders were employed in the process. Subcommittees of between four and six persons "spent (differing amounts of) time... in the grading process for a variety of reasons, including but not limited to the number of graders who were available. We simply have no way of ascertaining how much time any particular subcommittee spent on grading individual exam answers." During this indeterminate amount of time, these graders graded up to two thousand seven hundred eighty-four responses, each of which was expected to reflect the thoughtful work of one-half hour by each applicant. Further, each subcommittee spent a differing and indeterminate portion of the total time allotted for grading in calibration of Exam answers, anywhere from one to three hours. Presumably food was necessarily consumed at some point, if not calls of nature heeded. Under the best of circumstances, it strains credulity to assert that grading was or could be either uniform, consistent or nondiscriminatory, there having been available as little as six minutes per grader to devote to the duties of reading multiple issue (up to nine or more) answers, of analyzing those answers, of comparing answers scored with frequent reference to

"benchmark papers" (Handbook Rule V. E. 1.) and of recording the same, without error, upon grading sheets;

g. Respondent's General Counsel has notified Petitioner, through Counsel, that sub-issue grading sheets regarding the Exam's Ethics Question were in the possession of graders and not the Respondent when requested through discovery, some several months after grading was completed. This breach of security violates the provisions of Handbook Rule V. E. and may well have been repeated with respect to other Exam questions, as may be determined by further discovery. Alone or in combination with similar breaches, if any, this Rules violation fatally compromises the integrity of the Exam.

5. Petitioner has not been provided, through discovery or otherwise, information sufficient to admit or dispute the statement by the ACP in Finding of Fact # 5 that Petitioner's scores were accurately transferred from scoring sheets to his test record.

6. With respect to the ACP Finding of Fact # 6, Petitioner does not contest that" .... the Torts question was excluded from the calculation of the score of the examination..." by the Grading Committee. However, the stated reason for excluding the Torts question, that "there were too few issues," is inconsistent with the reasons previously provided by Bar personnel. Despite putatively having been reviewed for competency, the question was deemed incompetent and statistically invalid by the Grading

Committee, without consultation or input from a psychometrician or other qualified expert.

7. In response to the ACP's Finding of Fact # 7, Petitioner admits that his raw essay scores were, in some manner, scaled to the MBE portion of the examination; that MBE equated scores and essay scaled scores were in some manner combined; and that applicants receiving a weighted score of at least 130 were deemed to have passed the Exam. However, Petitioner emphatically denies that the manner in which Exam scores were scaled enhanced the validity of the scores in that:

a. Numerous statistical and mathematical inconsistencies, inaccuracies and errors in Respondent's own data, including data used to compute the Standard Deviation Formula, render the scoring and scaling of the Exam invalid. A summary of these inconsistencies, inaccuracies and errors is set forth in Appendix A attached hereto;

b. Respondent has provided no evidence that scaling protects against intentional bias in the grading and scoring of examinations such as the Exam. For example, if despite objectively adequate and responsive answers to examination questions, a grader were, for reasons of bias, to assign substandard scores or scores of zero, scaling would in fact, exacerbate rather than ameliorate the detrimental effects of such illegal conduct; and

c. As asserted in Petitioner's Petition for Review, the deletion of an essay question from the Exam

caused the remaining questions to be given a raw weight in excess of that permitted by Rule 7-4 of the Rules Governing Admission to the Utah State Bar ("Rules") in the process of scaling the essay portion of the Exam to the MBE. This Rules violation rendered the scaling of the essay portion of the Exam fatally flawed.

8. Petitioner, in response to the ACP's Findings of Fact # 8-12, asserts that elimination of one of the 12 essay questions from consideration in the grading and scoring of the Exam is not, as the ACP implies, a *de minimus* violation of the Rules, for the following reasons:

a. Petitioner and others similarly situated were deprived of time to accrue points on the eleven remaining questions which would have been available had the Exam not been defective;

b. Failure to have graded twelve essay questions is fatal to the validity of the Exam because it requires that a greater raw weight be accorded the remaining eleven questions in the scaling of the essay portion of the Exam to the MBE's two hundred points, in contravention of the Rules and the Handbook;

c. The ACP's own analysis in Finding of Fact # 9 suggests that in order to allow that "...qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects... and .. to enhance the examination's statistical reliability..." the examination

should include twelve questions as, indeed, current Rules **compel**; and

d. Petitioner was denied an opportunity to accrue points which others might not have accrued. The ACP's "re-scoring" of Petitioner's examination by according **all** applicants a score of five points upon the defective and deleted examination question does not accurately or in a statistically valid manner credit Petitioner with points which he was deprived the opportunity to accrue, since to accord all applicants five points has the net effect of giving **none** to any applicant. Since it is impossible to remedy this loss in a manner consistent with Due Process and Equal Protection, the Exam itself is rendered fatally defective. The results of the Exam must be vacated or all applicants must be deemed to have passed the same.

Petitioner contends that the ACP's assertion of the *non sequitur* that, in effect, eleven really equals twelve even if one began with twelve, is not merely illogical, but completely contravenes the Rules. Rule 7-1 of the Rules states that "the essay portion of the examination **shall** consist of twelve questions." This language is clearly mandatory and not permissive. The violation of this rule is both legally and actually substantive, prejudicial and alone, invalidates the results of the Exam. It is noteworthy that in re-scoring Petitioner's Exam by giving all applicants five additional points, the ACP tacitly admits the impropriety of having denied Petitioner the opportunity to accrue points toward passage of the Exam.

The ACP suggests that were there "... a significant deviation in the appropriate procedures in preparation of the essays, grading of the essay answers and uniformity of grading, there would be a significant deviation in the overall pass rate for the examination." This argument is not syllogistic, reaches the unfounded conclusion that violation of Rule 7-1, however flagrant, is superfluous and suggests a predisposition on the part of the ACP to preserve "inviolate" the results of the Exam, regardless of the consequences.

9. Petitioner, in response to the ACP's Findings of Fact # 13-16, refers the Commissioners to discovery provided by Respondent, consisting of partial records of Bar Examination Results from 1991 through 2000, attached hereto as Exhibit 5. Respondent has admitted that fully one-third of attorney applicants who took the July 2000 Utah Bar Examination were failed. The ACP's assertion that the overall pass rate for the Exam was well within an average range intentionally obfuscates the numbers relating to the pass rate of attorney applicants, misleads the casual observer into assuming that any anomaly in results was benign and improperly suggests that attorney applicants were treated similarly to non-attorney applicants in the scoring of the Exam. Moreover, to suggest that there could be any legitimate purpose in identifying attorney applicants by **any** means in the **grading** of essays, regardless of wholly unrelated administrative needs of the Bar, is ludicrous. To suggest that a grader would not recognize such distinctions, if not the reason therefor, defies logic.

The ACP suggests, in Finding # 16, that Petitioner could or should have misrepresented to the Bar his status as a practicing attorney in two other jurisdictions and registered

as a "student applicant" in order to avoid the adverse consequences of having an MBE score arbitrarily assigned. The ACP's statements that "[t]here are no rules that would prohibit an out-of state licensed attorney from applying as a student applicant" completely ignores the Rules. Rule One defines an Attorney Applicant as "any person who satisfies the requirements of Rule 4" and Rule Four provides a list of the requirements, including admission to the practice of law in a sister state for no less than five years. Rule 10-1 states that "the Attorney Examination consists of the essay portion of the Student Bar Examination," The Attorney Examination does not include the MBE presumably because Attorney Applicants have demonstrated their competence by previously passing this examination. The ACP's suggestion that Petitioner violate the Rules of Admission to the Utah State Bar is disingenuous and ethically improper.

10. Petitioner, in response to the ACP's Findings of Fact # 17 and 18, would concede that attorney applicants are "imputed" a score of 130 for an MBE score, that essay scores are then scaled to the MBE. However, the statement that "an individual attorney applicant's scaled essay score is not combined with the imputed MBE score for determining if the attorney applicant has achieved a passing score" is contrary to the manner in which Petitioner' s Exam was actually graded. Correspondence of September 27, 2000 sent to Petitioner and attached hereto as Exhibit 9 establishes that, contrary to the contention of the ACP, this is precisely what occurred. Indeed, Petitioner's scaled essay score, 120.94 was combined with his "imputed" MBE score of 130 and the two scores were averaged yielding a Total **Combined** (emphasis added) Score of 125.47.

The ACP has provided no justification for assigning Petitioner a score of 130, in effect, a "D minus," when Petitioner has established his competency in passing two separate state Bar examinations, both of which included the MBE. The ACP states in Paragraph 6 of its Conclusion and Recommendations that "[a]ssigning attorney applicants a score of 130 for purposes of scaling the essay portion of the examination to the MBE portion does not disadvantage attorney applicants." Even if this were accurate, **assigning a score of 130 for purposes of calculating a total combined score** does disadvantage, in a discriminatory manner, the attorney applicants. Had the grading process afforded Petitioner even an average MBE score of 144.17, his total combined score would have been a passing score: 120.94 +144.17= 265.11 divided by 2 = 132.55 total combined score.

To exempt an applicant from an examination and then to assign to that applicant a substantially substandard score for grading purposes, denies due process. To allow non-attorney applicants with essay scores comparable to those of Petitioner the opportunity to accrue points upon the MBE toward a passing total combined score, while not affording Petitioner the same opportunity denies equal protection. It also suggests discrimination intended to restrain trade.

11. Petitioner responds to the ACP's Finding of Fact # 19 first, by incorporating and re-assenting those arguments made above; and second, by asserting that because of the numerous defects in the composition, administration and grading of the Exam, the Exam was not and could not be an accurate indicator of Petitioner's competency.

PRAYER FOR RELIEF

Petitioner would reiterate that he is entitled to relief in the form of a vacation of the scores of all applicants who took the July 2000 Bar Examination and the re-administration of the Examination to all in accordance with the applicable governing Rules and in a non-discriminatory manner. In the alternative, Petitioner asserts that he is entitled to be deemed to have passed the Examination as were others deemed to have passed, in spite of the defective composition, administration and grading described above. Due Process and Equal Protection of the law mandated by the Fourteenth Amendment to the Constitution of the United States, require no less.

DATED this 5th day of January, 2001.

/s/ _____
Carolyn Montgomery
Attorney for Petitioner

Response to Admissions Committee Panel's Findings of Fact and Recommendation - Wansker

APPENDIX "A"

SUMMARY OF MATHEMATICAL AND STATISTICAL DISCREPANCIES

Number of Applicants Taking 2000 Bar Examination

232	2000 Bar Examination Results; Exhibit 5
235	Letter from General Counsel dated 12-1-00, attachment on Ethics bell curve; Exhibit 3

Number of Applicants Passing the 2000 Bar Examination

199	Standard Deviation Formula; included as an attachment to Letter from General Counsel dated 11-16-2000; Exhibit 6
204	Findings of Fact and Recommendation
204	Pass List for the 2000 Examination posted on the Utah State Bar Web Site, dated October 13, 2000
203	Pass List for the 2000 Examination posted on the Utah State Bar Web Site, Amended October 17, 2000

204	2000 Bar Examination Results; Exhibit 5

Percentage of Passing Applicants

85.78% (199 out of 232)	Standard Deviation Formula; included as an attachment to Letter from General Counsel dated 11-16-2000; Exhibit 6
87.9% (204 out of 232)	2000 Bar Examination Results; Exhibit 5
87.9%	Findings of Fact and Recommendation

Average MBE Score for All Applicants

144.17	Findings of Fact and Recommendation
144.17	Standard Deviation Formula; included as an attachment to Letter from General Counsel dated 11-16-2000; Exhibit 6
144.17	Letter from General Counsel dated 11-22-00 Exhibit 7
145.57	Letter from Admissions Administrator dated 10-4-00; Exhibit 8

145.57	2000 Bar Examination Results; Exhibit 5

Range of Scaled MBE Scores

108.63 to 175.70	Letter from Admissions Administrator dated 10-4-00; Exhibit 8
108.00to 181.00	2000 Bar Examination Results; Exhibit 5
108.00to 175.00	Letter from General Counsel dated 11-22-00 Exhibit 7

APPENDIX L

RULES GOVERNING ADMISSION TO THE UTAH STATE BAR

645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077

RULE ONE
Definitions

Section 1-1. Definitions. As used in the rules relating to admission, the following terms shall be given the following meanings, except as otherwise provided or may result from necessary implication from the rule.

Approved Law School. An "approved law school" is one which is fully or provisionally approved by the American Bar Association pursuant to its Standards and Rules of Procedure for Approval of Law Schools.

Attorney Applicant. An "attorney applicant" is any person who satisfies the requirements of Rule 4.

Student Applicant. A "student applicant" is any applicant for admission to the Bar who does not qualify as an "attorney applicant" under Rule 4.

RULE TWO
Board of Commissioners - General Powers

Except as otherwise indicated the word "Board" as used in these rules refers to the Board of Commissioners of the Utah State Bar. For the purposes of these rules, applicants are classified as either "student applicants" or "attorney applicants."

Section 2-1. Admission to the Bar. The Board shall recommend and certify to the Supreme Court for admission to the Bar such persons, and only such persons, who possess the necessary qualifications of learning, ability and character which are a prerequisite to the privilege of engaging in the practice of law, and who fulfill the requirements for admission to the Bar, as provided by these rules.

Section 2-2. Subpoena Power. Any member of the Board, or the Executive Director or the Secretary or an Assistant Secretary thereof, shall have power to issue subpoenas for the attendance of witnesses or for he production of documentary evidence before the Board or before anyone authorized to act in its behalf.

Section 2-3. Administration of Oaths. Any member of the Board or the Executive Director shall have power to administer oaths in relation to any matter within the functions of the Board.

Section 2-4. Taking of Testimony. Any member of the Board, and any other person who has power to administer oaths, shall have power, upon order of the Board, to take testimony in reference to any matter within the function of the Board.

Section 2-5. Regulations. The Board is empowered to adopt and enforce such reasonable regulations and to appoint such committees in furtherance of the purpose of these rules and to facilitate their administration as may be necessary or advisable.

RULE THREE
Qualifications for Admission of Student Applicants

Section 3-1. Requirements of Student Applicants. To be recommended as a student applicant for admission to the Bar, a person must:

1. Have filed an application for Bar Examination and Admission to the Bar as a student applicant in accordance with Rule 5;

2. Be at least twenty-one years old;

3. Have graduated with an LL.B, J.D., or equivalent degree from an approved law school.

4. Be of good moral character and have satisfied the requirements of Rule 6;

5. Have successfully passed the Bar Examination as prescribed in Rule 7;

6. Have complied with the provisions of Rule 12 concerning enrollment fees;

7. Have successfully passed the Multistate Professional Responsibility Examination (MPRE)as prescribed in Rule 7-8.

Section 3-2. Foreign Law School Applicants. Applicants who have not graduated from an ABA accredited law school, but who have graduated from a foreign law school in a country where principles of English common law form the basis for the country's jurisprudence, may be recommended for admission to the Bar under the following conditions:

1. Have filed an application for Bar Examination and Admission to the Bar as a foreign law school applicant in accordance with Rule 5;

2. Be at least twenty-one years old;

3. Have (a) been admitted to practice in the jurisdiction where the applicant attended law school, and (b) successfully completed, within twenty-four (24) consecutive months, not less than twenty-four (24) semester hours, or their equivalent in quarter hours, at an ABA-approved law school, including no less than one course each in constitutional law, civil procedure, legal ethics and evidence.

4. Be of good moral character and have satisfied the requirements of Rule 6;

5. Have successfully passed the Bar Examination as prescribed in Rule 7;

6. Have complied with the provisions of Rule 12 concerning enrollment fees;

7. Have successfully passed the Multistate Professional Responsibility Examination (MPRE) as prescribed in Rule 7-8.

Section 3-3. Other Foreign Law School Graduates. All other students and graduates from foreign law schools not meeting the requirements of Section 3-2 may be recommended only if they have been admitted to an ABA approved law school, consistent with Standard 308 of the American Bar Association Standards for Approval of Law Schools, and have completed the required course of study resulting in a LL.B., or J.D. degree from that school.

Section 3-4. Foreign Law Schools. A foreign law school, for purposes of these rules, is any school located outside of the U.S. and its protectorates, and accredited by that jurisdiction's legal accreditation body, if one exists, or who's graduates are otherwise permitted by that jurisdiction's highest court to practice law.

RULE FOUR
Qualifications for Admission of Attorney Applicants

Section 4-1 Requirements of Attorney Applicants. To be recommended as an attorney applicant for admission to the Bar, a person must:

1. Have filed an application for the Utah Bar Examination and Admission to the Bar as an attorney applicant in accordance with Rule 5;

2. Be at least twenty-one years old;

3. Have been admitted to the practice of law before the highest court of a sister state or the District of Columbia for no less than five years, and have been substantially and lawfully engaged in the practice of law in such jurisdiction for any four of the five years immediately preceding the filing of the application. For purposes of this rule, the practice of law includes the following activities or the equivalent thereof:

   (a) sole practitioner in a private law firm;

   (b) partner, shareholder, associate, or one of counsel in a private or public law firm;

   (c) officer of a corporation or other business organization whose principal responsibilities include rendition of legal advice and/or assistance;

   (d) government employee whose principal duties are providing legal advice to the governmental agency by which he or she is employed or representing such agency before the courts;

   (e) service in the armed forces in the Judge Advocate department in a legal capacity in any state;

(f) judge of a court of general or appellate jurisdiction requiring admission to the Bar as a qualification for admission thereof;

(g) law clerk to a judge of a court of general or appellate jurisdiction;

(h) teaching full-time in an approved law school.

4. Be of good moral character and have satisfied the requirements of Rule 6;

5. Have successfully passed the Bar Examination as prescribed inRule 10-1;

6. Have complied with the provisions of Rule 12 concerning enrollment fees;

7. Have successfully passed the Multistate Professional Responsibility Examination (MPRE) as prescribed in Rule 7-8.

RULE FIVE
Application Forms and Fees

Each applicant of admission must file an application for examination and admission to the Utah State Bar on a form prescribed by the Board, which shall include an authorization and release to enable the Board to obtain information concerning the applicant.

Section 5-1. Applications. All applicants shall file completed applications for permission to take the Bar Examination and for Admission to the practice of law in this state with the Utah State Bar office by October 1 preceding the February Bar Examination and by March 1 preceding the July Bar Examination.

Section 5-2. Applicant Filing Fees. Filing fees shall be established by the Board and shall be submitted with the application according to the deadlines in Section 5-1.

Permission to sit for the Utah Bar Examination may be withheld for any applicant who does not satisfy the documentation requirements ten days before the examination is to be administered.

Section 5-3. Withdrawal of Applications. If the application is withdrawn in writing prior to 30 days before the examination date for which the applicant has filed to sit, one-half of the filing fee shall be refunded.

RULE SIX
Moral Character & Fitness

Section 6-1. Standard of Character and Fitness. An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.

Section 6-2. The Investigative Process. Investigations into the moral character and fitness of applicants may be

informal, but shall be thorough, with the object of ascertaining the truth. The Board or a committee appointed by the Board may act with or without requiring a personal appearance by an applicant. If an applicant is required to appear, the Board or committee may require the applicant to appear under oath. After investigation is complete, if the Board or committee is not prepared to certify the applicant, it shall promptly notify the applicant by certified mail that the applicant has not been approved to sit for the Bar Examination and for Admission to the Bar.

Section 6-3. Confidentiality and Due Process. Records and sources shall be kept confidential in order to protect the applicant and the sources. Applicants shall be provided with notice and an opportunity to appear, with right to counsel, before the Board before a final adverse determination is made. Following denial of admission on character and fitness grounds, re-application may be made after one year unless otherwise set forth at the time of denial.

Section 6-4. Release of Information. Except as otherwise authorized by order of the Supreme Court, the Board or committee appointed by the Board shall deny requests for confidential information but may grant the request if made by:

a. An agency authorized to investigate the qualifications of persons for admission to practice law;

b. An agency authorized to investigate the qualifications of persons for government employment;

c. A lawyer discipline enforcement agency; or

d. An agency authorized to investigate the qualifications of judicial candidates.

If the request is granted, information shall be released only upon certification by the requesting agency that the confidential information shall be used for authorized purposes only. If one of the above enumerated agencies requests confidential information, the Board or committee shall give written notice to the applicant that the confidential information will be disclosed within ten days unless the applicant obtains an order from the Supreme Court restraining such disclosure.

Section 6-5 Evidence. In addition to the standard set forth in 6-1 above, the revelation of discovery of any of the following should be treated as cause for further inquiry before the Board decides whether an applicant possesses the requisite character and fitness to practice law:

a. the applicant's lack of candor
b. unlawful conduct
c. academic misconduct
d. making of false statements, including omissions
e. misconduct in employment
f. acts involving dishonesty, fraud, deceit or misrepresentation
g. abuse of legal process
h. neglect of financial responsibilities
i. neglect of professional obligations
j. violation of an order of a court
k. evidence of mental or emotional instability

l. evidence of drug or alcohol dependency

m. denial of admission to the bar in another jurisdiction on character and fitness grounds

n. past or pending disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction

o. other conduct bearing upon moral character or fitness to practice law

In making this determination through the processes described above, the following factors should be considered in assigning weight and significance to prior conduct:

a. the applicant's age at the time of conduct

b. the recency of the conduct

c. the reliability of the information concerning the conduct

d. the seriousness of the conduct

e. the factors underlying the conduct

f. the cumulative effect of conduct or information

g. the evidence of rehabilitation

h. the applicant's positive social contributions since the conduct

i. the applicant's candor in the admissions process

j. the materiality of any omission or misrepresentations

Rules Governing Admission to the Utah State Bar

ADDENDUM/ERRATUM TO ADMISSION RULES

RULE 6-7. Pursuant to an order by the Utah Supreme Court, effective November 1, 1997, former Rule 6-6 Review After Denial (which was renumbered as Rule 6-7 on January 1, 1999) has been amended to provide that three voting members of the Board of Bar Commissioners rather than the entire board will hear appeals if an applicant for admission is denied certification on the grounds of character and fitness by the Committee as follows:

b. The hearings before three voting members of the Board shall be private unless the applicant shall request that they be public. The Board shall establish procedures such that a predetermined rotating panel of three voting members will participate in the hearing. The hearing shall be conducted in a formal manner, with the applicant having the fights set forth in this rule. The burden of proof shall be on the applicant to establish that he or she is possessed of good moral character and entitled to the high regard and confidence of the public, and removing any and all reasonable suspicions of moral unfitness. The panel shall not be bound by the formal rules of evidence; it may in its discretion take evidence in other than testimonial from, having the right to rely upon deposition, but all testimonial evidence shall be in either event be taken under oath. A complete stenographic record of the hearing shall be kept, and a transcript may be ordered by the applicant at his or her own expense.

c. If after such hearing the three-member panel of the Board does not certify the applicant, it shall make written findings and conclusions and it shall deliver a copy thereof to the applicant

RULES 6-6 and 6-7. Effective January 1, 1999, former Rule 6-6 [Review after Denial] has been renumbered as Rule 6-7.

RULE 3-2. (3) Foreign Law School Applicants should read: Have (a) been admitted to practice in the jurisdiction where the applicant attended law school, and Co) successfully completed, within twenty-four (24) consecutive months, not less than twenty-four (24) semester hours, or their equivalent in quarter hours, at an ABA-approved law school, including no less than one course each in constitutional law, civil procedure, *criminal procedure,* legal ethics and evidence.

RULE 6-1. Standard of Character and Fitness has been amended to read: An attorney's conduct should conform to the requirements of the law, both in professional service to clients and in the attorney's business and personal affairs. An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission. The change is effective as of January 1, 1999.

RULE 6-6. Effective January 1, 1999, Rule Six has been amended to provide for a new rule, numbered Rule 6-6. Criminal Conduct; Parole, Probation and Supervised Release.

1. An applicant convicted of a misdemeanor offense or who has entered a plea in abeyance to any criminal offense may be asked to appear before members of the Character and Fitness Committee. Traffic violations carrying a potential jail sentence are included. In determining whether the applicant is of good character, the Committee will consider the nature

and seriousness of the criminal conduct resulting in the convictions(s), mitigating and aggravating factors including completion of terms and conditions of any sentence imposed and demonstration of dearly proven rehabilitation.

2. A rebuttable presumption exists against admission of an applicant convicted of a felony offense. An applicant who has been convicted of a felony offense is not eligible to apply for admission until after the date of completion of any sentence, term of probation or term of parole or supervised release whichever occurred last. For purposes of this rule, a conviction includes entry of a *nolo contendre* (no contest) plea. Upon an applicant's eligibility, a hearing before members of the Character and Fitness Committee will be held with the applicant beating the burden of overcoming the presumption against admission by clear and convincing evidence. Factors to be considered by the Committee include, but are not limited to, the nature and seriousness of the criminal conduct resulting in the conviction(s), mitigating and aggravating factors including completion of terms and conditions of an sentence imposed and demonstration of clearly proven rehabilitation.

Conduct that is merely socially unacceptable or the physical disability of the applicant is not relevant to character and fitness for law practice and should not be considered.

Section 6-6. Review after Denial. If an applicant is not certified by the Board or committee, and after notice is sent as required in Section 6-2, the applicant shall have the right to file a written request for hearing within ten days after such notice, and a hearing shall be granted by the Board under the following rules of procedure:

a. The Secretary of the Board shall notify the applicant of:

1) the date, time and place of such hearing:

2) the matters adverse to applicant which were disclosed in the preliminary hearing or hearings;

3) if such matters were based in whole or in part upon adverse statement from other persons, the names of such persons; and

4) the applicant's right to be represented by counsel at the hearing to examine and cross-examine witnesses, to adduce evidence bearing on the aforesaid adverse matters and upon the applicant's moral character and general fitness to practice law, and for such purpose to make reasonable use of the Board's subpoena powers.

b. The hearings before the Board shall be private unless the applicant shall request that they be public. The hearings shall be conducted in a formal manner, with the applicant having the rights set forth in this rule. The burden of proof shall be on the applicant to establish that he or she is possessed of good moral character and entitled to the high regard and confidence of the public, and removing any and all

reasonable suspicions of moral unfitness. The Board shall not be bound by the formal rules of evidence; it may in its discretion take evidence in other than testimonial form, having the right to rely upon records and other assistance in its inquiries; and may in its further discretion determine whether evidence to be taken in testimonial form shall be taken in person at the hearing or upon deposition, but all testimonial evidence shall be in either event be taken under oath. A complete stenographic record of the hearing shall be kept, and a transcript may be ordered by the applicant at his or her own expense.

c. If after such hearing the Board does not certify the applicant, it shall make written findings and conclusions and it shall deliver a copy thereof to the applicant.

With respect to Rule 6, the Utah Supreme Court has ruled:

Character reference letters submitted with application in which the writer requests confidentiality are to be held confidential and not placed in evidence or otherwise made available to decision-making body or anyone else involved in a decision-making capacity with respect to the admission of the applicant. Any such body or person having knowledge of the content of the information, including members of the Bar Commission shall withdraw from participation in the matter, and if necessary, the Bar Commission shall

appoint persons necessary to replace those required to withdraw from the decision-making process.

RULE SEVEN
Student Bar Examination

Section 7-1. Content. The Student Bar Examination shall consist of such questions as the Board shall select relating to the practice of law. The essay portion of the examination shall consist of twelve questions, some of which may be taken from the Multistate Essay Examination (MEE). One essay question shall deal with Legal Ethics.

Section 7-2. Composition. The Student Bar Examination shall include an essay component and the Multistate Bar Examination (MBE). The MBE and essay portions ordinarily will be given over a two-day period, with one day allocated to the MBE and one day to essay questions.

Section 7-3. Preparation of the Essay Examination. Essay questions may be:

1) taken from the Multistate Essay Examination;

2) prepared by practitioners and/or professors of law;

3) or both.

Model answers or outlines analyzing the issues presented shall be prepared by the author of the question. The answer or outline shall be submitted with the question to the Bar Examiner Review Committee.

The test questions and model answers shall be reviewed by the Bar Examiner Review Committee. The Bar Examiner Review Committee shall be independent of the Bar Examiners and shall determine the adequacy and appropriateness of all questions and model answers. The Bar Examiner Review Committee may require the questions and model answers to be rewritten or modified.

Section 7-4 Grading the Essay Examination. Essay answers shall be graded on a five-point scale. Each answer shall be graded on the following basis:

(A) No credit shall be given to an unanswered question or to a nonresponsive answer;

(B) A grade of 1 shall be given to an answer that is well below average;

(C) A grade of 2 shall be given to an answer that is below average;

(D) A grade of 3 shall be given to an answer that is average;

(E) A grade of 4 shall be given to an answer that is above average;

(F) A grade of 5 shall be given to an answer that is well above average.

Section 7-5. Uniformity of Grading. In order to assure maximum fairness and uniformity in grading, the Board shall prescribe procedures and standards for grading to be used by all graders.

Section 7-6. Method for Combining Scores. After all essay questions are graded, the grades received shall be added together for each applicant and scaled to the MBE portion of the examination. MBE scaled scores and essay scaled scores shall be combined according to the standard deviation method. An applicant who receives a combined score of 130 or above by this method passes the Bar Examination.

Section 7-7. Administration of Essay Examinations Under Special Circumstances. Applicants who have medical, physical, or cognitive disabilities may request examinations be administered under special circumstances to accommodate their disability. Cognitive disabilities do not include "English as a second language." Such requests shall be made in writing at the date of application. Each request shall be reviewed and any special accommodation shall be made on an individual basis.

Section 7-8. Multistate Professional Responsibility Examination (MPRE). Each applicant must achieve an MPRE scaled score of 80 within two years before or following the date of the examination and provide proof thereof.

The MPRE is administered by the National Conference of Bar Examiners. Any person seeking to take the MPRE shall file an application with and pay the fee specified by the National Conference of Bar Examiners.

To be eligible to have his or her score on the MPRE accepted by the Board as satisfying the requirements of this rule, a student applicant must have completed one year of law school.

RULE EIGHT
Retaking of Examination

Section 8-1. Students Failing Bar Examination. All applicants failing will be required to retake the complete Bar Examination. Scores on the essay or MBE portions of the examination will not be carried over.

RULE NINE
Transferability of Scores

Section 9-1. Scores achieved on the Multistate Bar Examination (MBE) administered in a jurisdiction other than Utah will not be accepted unless the examination is taken concurrently with the Utah examination.

RULE TEN
Attorney Examination

Section 10-1. Content. The Attorney Examination consists of the essay portion of the Student Bar Examination and will administered the same date and time as the Student Bar Examination. The Attorney Examination will be graded and scaled to the MBE according to the procedures set forth in Rule 7-6. The passing applicant must achieve a score of 130 on the examination.

Section 10-3. Failing Applicant. An applicant who fails the Attorney Examination may sit for subsequent examinations, including successive examinations, upon payment of any required fees.

RULE ELEVEN
Unsuccessful Applicants; Right of Inspection

Section 11-1. Test Inspection. Examinations shall be retained for not less than six (6) months after the date that examination results have been announced. An unsuccessful applicant shall be entitled to a reasonable inspection of:

(1) the essay questions;

(2) the applicant's answers to the essay portion of the examination;

(3) sample answers for each question.

This rule does not permit applicants to inspect the Multi-State Bar Examination.

Section 11-2. Bar Examination Grading. The Board shall only review petitions of failing applicants who claim that this failure was because of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process. The petition must be filed in writing by the applicant within thirty (30) days after notice to the applicant of examination results.

RULE TWELVE
Certificate of Admission, Membership and Fees

Section 12-1. Fees. Upon notification that the Board has approved the applicant for admission and before an motion is made to the Supreme Court for admission, the applicant shall pay to the Utah State Bar the fee for an active

or inactive member as appropriate, and also the admission fee of fifty dollars ($50.00) to be transmitted by the Utah State Bar to the Clerk of the Supreme Court upon the issuance of the applicant's Certificate of Admission.

Section 12-2. Non-compliance. If the applicant fails to comply with the preceding section and does not appear for admission within six (6) months after being called to appear before the Supreme Court for admission, the approve of his or her application for admission to the Bar shall be deemed to be withdrawn. The Board may reapprove such application upon a satisfactory showing of the qualifications of the applicant at the time he appears for admission to the Bar, or may grant an extension of the time for making appearance upon petition.

Section 12-3. There are two admission ceremonies each calendar year. To be admitted to the Utah State Bar you must participate in an Admissions Ceremony and pay the proper fees so that you name can be put on the motion submitted to the court the day of the ceremony. No other motions for admission to the Bar will be submitted to the court until the next scheduled Admissions Ceremony. NO EXCEPTIONS.

RULE THIRTEEN
Practice of Law in Utah

Section 13-1. Practice of Law. To practice law in Utah, an attorney must be an active member of and in good standing with the Utah State Bar.

Section 13-2. Admissions Pro Hac Vice. For the purpose of an individual case, no member of the bar of any

jurisdiction may appear in the courts of this state without associating a licensed active attorney upon whom pleading and other papers may be served and who shall be responsible for the ethical conduct of such attorney under the provisions of the Rules of Conduct of the Utah State Bar.

RULE FOURTEEN
Readmission after Resignation or Disbarment

Section 14-1. Readmission after Resignation. Readmission subsequent to the resignation of a member of the Bar shall be by petition in writing verified by the petitioner, addressed to the Board and filed with the Executive Director. The petition shall set forth the name, age, residence and address of the petitioner, his residence and occupation during the period subsequent to his resignation, the reasons for this resignation and a copy of the Order of the Supreme Court, if any, with respect to the resignation. The petition must be accompanied by a filing fee of $200.00.

Section 14-2. Readmission after Disbarment. An applicant for readmission to the Bar after disbarment shall satisfy all requirements of Rule 3 as stated above, and shall satisfy all other requirements imposed by the Supreme Court.

RULE FIFTEEN
New Lawyer Continuing Legal Education
Effective July 1991

Section 15-1. The New Lawyer Continuing Legal Education program is divided into three parts, and is designed to ease the transition into practice. All Utah Attomeys who have an active license are required to comply with Mandatory Continuing Legal Education "MCLE". As stated in Rule 3 of

the MCLE Rules, new admittees will meet their first two-year requirement through the New Lawyer Continuing Legal Education "NLCLE" program. The program is as follows:

a. A one day "NLCLE" program Which is given annually.

b. Four monthly "NLCLE" workshops (three hours each) that will be sponsored by the Utah State Bar.

c. Twelve hours of approved live continuing legal education.

If you serve as a judicial law clerk, practice law out-of-state, have an inactive licenses, or have a hardship you may apply for an extension or a waiver. For further information, please contact Sydnie W. Kuhre at 531-9095.

RULE SIXTEEN
Licensing of Foreign Legal Consultants

Section 16-1. General Regulation as to Licensing. IN ITS DISCRETION, the Utah Supreme Court may license to practice in this State as a Foreign Legal Consultant, without examination, an applicant who:

(a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(b) possesses the good moral character and general fitness requisite for a member of the Utah State Bar; and

(c) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

(d) has passed the MultiState Professional Responsibility Examination.

Section 16-2. Proof Required. An applicant under this Rule shall file with the Utah State Bar:

(a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to her or his good standing as such attorney or counselor at law or the equivalent;

(b) a duly authenticated English translation of such certificate, if it is not in English; and

(c) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Sections 1 and 6 of this Rules as the Utah Supreme Court may require.

Rules Governing Admission to the Utah State Bar

BAR EXAM REVIEW COURSES

The Utah State Bar does not endorse any provider of bar review courses. The following information is provided for reference only.

Multistate Review Course, contact Debra Roberson-Ochoa, Preliminary Multistate Bar Review, 1247 Sixth Street, Santa Monica, CA 90401 1-800-523-0777.

BARBRI Bar Review, 1-800-729-0190

MPRE SCORE

Verification of passage of the Multistate Professional Responsibility Examination (MPRE) with a scaled score of 80 or better within two years before or following the date of examination is required of all applicants before admission to the Bar.

GENERAL BAR EXAMINATION INFORMATION FOR STUDENT APPLICANTS

STUDENT BAR EXAMINATION:

The Utah Student Bar Examination is a two-day examination, consisting of a one-day essay examination component and a one-day Multistate Bar Examination (MBE) component. The total time allotted for each component is six hours.

Rules Governing Admission to the Utah State Bar

The Essay Examination.

The examination is given the first day. It consists of 12 essay questions: six queStions in the morning session and six in the afternoon. The six morning essay questions could be taken from the Multistate Essay Examination (MEE) questions. The MEE questions are taken from the following ten subject areas:

Agency and Partnership
Commercial Paper
(Negotiable Instruments)
Conflict of Laws
Corporations
Decedent's Estates
Family Law
Federal Civil Procedure
Sales
Secured Transactions
Trusts and Future Interests

The remaining essay questions are state prepared and will be from the following 15 subject areas:

Administrative Law
Business Entities (including corporations)
Civil Procedure
Utah Constitutional Law
Federal Constitutional Law
Contracts
Creditor/Debtor
Criminal Law and Procedure
Ethics
Evidence

Family Law
Real Property
Torts
Uniform Commercial Code
(Articles II, III, IV, IX)
Wills/Estate Planning/Trusts
(including tax aspects)

Applicants are expected to answer using the Utah Rules of Civil Procedure, the Federal Rules of Civil Procedure, the Utah Rules of Professional Conduct, the Utah Rules of Evidence and the Federal Rules of Evidence as applicable.

The Multistate Bar Examination.

The Multistate Bar Examination (MBE) is given the second day. It consists of 200 multiple choice questions.

UTAH STATE BAR EXAMINATION APPLICANT INSTRUCTIONS

A. Application Purchase

Applications for admissions to the Utah State Bar and the Rules Governing Admission to the Utah State Bar are available for purchase at the Bar Offices, 645 South 200 East, Salt Lake City, Utah 84111. The cost for an application is $15.00.

B. Application Fees

1. "Student Applicants" $400

   - Applicants who have never been admitted in any jurisdiction

   - Apply for Student Bar Examination

2. "Student Applicants" $575

   - Applicants who have been admitted in one or more jurisdictions as of the date of application to the Utah State Bar but have not met the "4 of last 5 years' practice requirement."

   - Apply for Student Bar Examination

3. "Attorney Applicants" $575

   - All others

   - Apply for Attorney Bar Examination

C. Filing Information

1. The Utah Student Bar Examination is given on the last Wednesday and preceding Tuesday in February and July of each year. **Filing deadlines are March 1 for the July examination and October 1 for the February examination.**

2. Complete applications will be accepted up to 30 days after the filing deadlines if accompanied with a $100.00 late fee

3. Complete applications will be accepted between 30 and 60 days after the filing deadlines if accompanied with a $300.00 late fee.

Applications will not be accepted if filed later than 60 days after the filing deadline.

4. Applications should be mailed to the Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

FINGERPRINT CARD

All applicants are required to be fingerprinted. Fingerprints can be obtained through the Bureau of Identification, Hall of Justice Building, Salt Lake City, Utah and will be mailed to the Bar by that office. Fingerprints from other sources must be mailed to the Utah State Bar from the sources rather than filed by the applicant. All fingerprints must be mailed to the Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. Fingerprint cards are available at the Bar office if you are unable to obtain fingerprint cards from your local agency.

GENERAL INSTRUCTIONS

1. Read the entire application carefully before making any entries.

2. Type or legibly print answers.

3. Give complete answers. Do not leave any spaces blank. If a question is not applicable, indicate with "N.A."

4. Avoid the use of abbreviations.

5. Give complete dates, full street names and numbers, city, state and zip codes. Contact your post office to obtain zip codes if you do not have the zip codes for your references.

6. When listing references, include individuals you have associated with in your areas of residence as well as those you have associated with in the practice of law.

7. If additional paper is used to supplement answers, indicate clearly the section and question number you are answering.

8. Be sure your application and Authorization and Release Forms are signed and properly notarized.

9. Contact our office immediately if any changes in your mailing address or phone number occur.

10. Applicants requiring special testing accommodations must submit a request in writing when the application is filed. Information regarding specific certification and verification of disability or handicap will be supplied to the applicant.

Rules Governing Admission to the Utah State Bar

Student Applicant
(never admitted)

The following items must be received on or before the filing deadline:

1. Completed application (signed & notarized) with correct application fee and signed.& notarized Authorization and Release;

*2. Three character reference letters;

*3. Two Attorney character reference letters;

*All reference letters should be individuals other than those listed in the application and contain the following information: the length of time the writer has known the applicant, the nature of their association, and an opinion of the applicant's moral character and fitness to practice law. These letters may not be written by persons related to the applicant or by fellow students. The letters should be original documents with an original signature. The attorney reference letters should be on the letterhead of the attorney.

6. Recent photograph, portrait type (including head and shoulders) no larger than 2-1/2" x 2-1/2".

7. Fingerprint card;

8. Final official college and law school transcripts.

   If the final transcript is not available when the application is filed, a letter of certification from the Office of the Dean of the law school may be filed with the application. The letter should verify that the applicant has met all of the requirements for graduation and the date graduation is expected. A final official transcript must be filed with the Utah State Bar before admission.

Student Applicant
(admitted in one or more jurisdictions)

All of the Student Applicant requirements plus:

A Certificate of Good Standing from the highest court or the state Bar association (if the Bar is an integrated Bar) of each jurisdiction where the applicant is admitted. The certificate should be dated not more than 90 days prior to the application filing date. Such certification should indicate date of admission, standing therein, and any disciplinary proceedings with the result of such proceedings.

Attorney Applicant

The following items must be received on or before the filing deadline:

1. Completed application (signed & notarized) with correct application fee and signed & notarized Authorization and Release;

2. A Certificate of Good Standing from the highest court or the state Bar association (if the Bar is an integrated Bar) of each jurisdiction where the applicant is admitted. The certificate should be dated not more than 90 days prior to the application filing date. Such certification should indicate date of admission, standing therein, and any disciplinary proceedings with the result of such proceedings.

3. Recent photograph, portrait type (including head and shoulders) no larger than 2-1/2" x 2-1/2";

4. Fingerprint card;

5. It is necessary for one of the following areas to be satisfied:

   (a) Certification from two judges of courts of general or appellate jurisdiction on the officiation letterhead of the judges and bearing the court seal, showing the length of time the applicant has been engaged in the practice of law; certification from two attorneys on their letter head showing the dates during which the applicant has been engaged in the practice of law and the nature of that practice; and letter from two clients for whom the applicant has handled legal business stating the nature of the business and whether .the services have been satisfactory; or

(b) Certification from the Dean of an accredited law school in which the applicant has been engaged in teaching law, on official letterhead and bearing the seal of the school, showing the length of time that the applicant has been so engaged; or,

(c) Certification from the Secretary of State or other proper officer of the sate wherein the applicant has served as a judge of a court of record, bearing the seal of the officer making the same, showing the dates during which the applicant has served; or,

(d) Certification from the Judge Advocate Department showing service in that department in a legal capacity, and showing the dates the applicant has served.

GENERAL BAR EXAMINATION INFORMATION FOR ATTORNEY APPLICANTS

ATTORNEY BAR EXAMINATION:

The Utah Attomey Bar Examination is a one-day examination, consisting of the same essay examination as for the Utah Student Bar Examination. The total time allotted for the attorney examination is six hours. There is not Multistate Bar Examination (MBE) component to the Attorney Bar Examination.

The examination consists of 12 essay questions: six questions in the morning session and six in the aftemoon. The

six morning essay questions could be taken from the Multistate Essay Examination (MEE) questions. The MEE questions are taken from the following ten subject areas:

Agency and Partnership
Commercial Paper
(Negotiable Instruments)
Conflict of Laws
Corporations
Decedent's Estates
Family Law
Federal Civil Procedure
Sales
Secured Transactions
Trusts and Future Interests

The remaining essay questions are state prepared and will be from the following 15 subject areas:

Administrative Law Business Entities
(including corporations)
Civil Procedure
Utah Constitutional Law
Federal Constitutional Law
Contracts
Creditor/Debtor
Criminal Law and Procedure
Ethics
Evidence
Family Law
Real Property
Torts
Uniform Commercial Code
(Articles II, III, IV, IX)

Wills/Estate Planning/Trusts
(including tax aspects)

Applicants are expected to answer using the Utah Rules of Civil Procedure, the Federal Rules of Civil Procedure, the Utah Rules of Professional Conduct, the Utah Rules of Evidence and the Federal Rules of Evidence as applicable.

The Utah Attorney Bar Examination is given in conjunction with the essay examination component of the Utah Student Bar Examination on the Tuesday preceding the last Wednesday in February and July of each year. Filing deadlines are March 1 for the July examination and October 1 for the February examination.

APPENDIX M

UTAH BAR EXAMINERS COMMITTEE GRADING HANDBOOK

ACKNOWLEDGMENT

The Utah State Bar Admissions Committee and Bar Examiners Committee wish to thank the Connecticut, California, Florida and Idaho Bar Examining Committees for their willingness to share their expertise and experience with us as we restructured our examination procedures. The Utah Bar Exandners Committee Grading Handbook has been modeled after similar grading handbooks used by these jurisdictions.

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Utah Bar Examiners Committee Grading Handbook

I. INTRODUCTION

The admissions process is conducted under the Rules Governing Admission to the Utah State Bar, which have been adopted by the Utah Supreme Court.

The Utah Bar Examination is administered twice a year in February and July. The examination is a two-day examination consisting of a one-day essay examination and a one-day Multistate Bar Examination (MBE). Each portion of the examination is six hours. The MBE is a multiple choice examination graded by the National Conference of Bar Examiners (NCBE). The essay portion of the examination is divided into two parts; in the morning, the applicants take the Multistate Essay Examination (MEE) which consists of six questions; in the afternoon the state-prepared portion consists of six questions. Both parts of the essay examination are graded by the Utah Bar Examiners.

The Bar utilizes the services of expert graders to grade the essay answers. The graders are qualified Utah attorneys or law professors who have expressed interest and are invited to serve as members of the Bar Examiners Committee as graders.

All members of the Bar Examiners Committee must treat in absolute confidence all information regarding the nature and content of their work for the Bar Examiners Committee, including the contents of the booklet. The Board of Bar Commissioners and the Supreme Court expect that each committee member will undertake the task of grading with the utmost seriousness. Committee members cannot be associated with bar review courses. Committee members who may be

involved in teaching law students must avoid offering "helpful hints" which could unfairly give advantage to these students.

The grading process requires strict adherence to the enclosed schedule to insure that scores are reported as soon as practicable. Your cooperation is essential to meeting this got. The sacrifices made by the graders in order to assure timely and accurate grading are greatly appreciated.

II. GENERAL BAR EXAMINATION INFORMATION

Subject Matter Identification

The Essay Examination

The essay examination is given the first day. It consists of 12 essay questions: six questions in the morning session and six in the afternoon. The morning session is the Multistate Essay Examination (MEE) developed by the National Conference of Bar Examiners. The MEE questions are taken from the following ten subject ares:

Agency and Partnership
Commercial Paper
(Negotiable Instruments)
Conflict of Laws
Corporations
Decedent' s Estates
Family Law
Federal Civil Procedure
Sales
Secured Transactions
Trusts and Future interests

The six afternoon essay questions are taken from the following 15 subject areas:

Administrative Law Business Entities
(including corporations)
Civil Procedure
Utah Constitutional Law
Federal Constitutional Law
Contracts
Creditor/Debtor
Criminal Law and Procedure
Ethics
Evidence
Family Law
Real Property
Torts
Uniform Commercial Code
(Articles II, III, IV, IX)
Wills/Estate Planning/Trusts
(including tax aspects)

Applicants are expected to answer using the Utah Rules of Civil Procedure, the Federal Rules of Civil Procedure, the Utah Rules of Professional Conduct, the Utah Rules of Evidence and the Federal Rules of Evidence as applicable.

State-prepared essay questions are confined to a single subject area while the MEE may include "cross-over" questions in which more than one subject area is tested. Both portions of the essay examination are graded by the Utah Bar Examiners Committee.

The Multistate Bar Examination

The Multistate Bar Examination (MBE) is given the second day and consists of 200 multiple choice questions. The MBE is graded nationally.

III. BAR EXAMINERS COMMITTEE COMPOSITION AND QUESTION PREPARATION

The Bar Examiners Committee is comprised of active members of the Utah State Bar in good standing and professors of law who have been selected by the Board of Bar Commissioners on the basis of demonstrated professional expertise. Members of the Bar Examiners Committee are appointed to serve a three (3) year term and may be reappointed to serve additional terms.

Bar examiners shall be arranged into subcommittees, called question committees, consisting of four members for each subject area. These subcommittees shall be responsible for drafting questions and grading answers in the assigned subject area. One member of each subcommittee is appointed as chairperson and will serve for a three (3) year term. The chairperson will be the liaison for the question committee with the Admissions Administrator. The chairperson is responsible for the timely submission of the completed questions and model answer to the Review Committee. Prior to the examination, the question committee chairperson shall designate one member of the committee as the "drafter" and one member as the "supervising grader". The supervising grader will moderate the calibration session as outlined in section V-E. The supervising grader will oversee the grading process, including reappraisal grading, and will prepare the final issue outline and revised model answer.

The drafter will prepare a question and model answer according to the guidelines in section III-

The remaining committee members will review, critique and suggest revisions for the question and model answer prior to submission to the Bar Examiners Review Committee and participate in grading the examination.

The question committee chairperson will submit the question and model answer to the Bar Examiner Review Committee. The Review Committee will analyze the question and model answer and may require the drafter to make revisions. Finally, the Review Committee will approve the questions for inclusion in the Utah portion of the examination. Additionally, the Review Committee will review the Multistate Essay Examination before administration of the examination to determine the appropriateness of the questions and to determine the composition of the Utah portion of the examination.

A. Questions/Model Answer Drafting Guidelines

1) The examination questions should be designed to be analyzed and answered in approximately 30 minutes. A rule of thumb for question length is that the question should be no more than 200 to 300 words in length or approximately one page double-spaced. Otherwise the applicant will spend a disproportionate amount of time reading and analyzing the questions as opposed to preparing his or her response.

2) The "call" of the question should draw the applicant's attention to the specific task assigned. The call of the

questions should be appropriate for a time restricted question.

3) Facts such as names, dates, and relationships must be described with absolute clarity. Idiomatic phraseology should be avoided. Parties should be identified in a manner that will help the applicant to distinguish one party from another.

4) The question should not be so broad as to invite a general or non-responsive discussion of a wide field of law, nor be so specific as to dictate the answer. Generally questions should test for basic legal principles which wouid be within the common "knowledge of recent law school graduates. Emphasis on fundamental legal principles should not preclude testing on issues of substantial local importance.

5) The question should include no more than 3 or 4 issues which the applicant can identify and analyze fully.

III. MULTISTATE ESSAY EXAMINATION GRADING PROCEDURE

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners and is graded by the Utah Bar Examiner Committee according to the scale outlined in section V-F of this handbook. The 1-6 grading scale included in section IV-A is used only as a guide by the National Conference of Bar Examiners during the MEE grading workshop.

Utah Bar Examiners Committee Grading Handbook

A. MEE Grading Workshop

The MEE questions and analyses are sent to all workshop participants by overnight courier immediately following the administration of the exam. Each participant is encouraged to conduct an independent analyses of the question he or she will be grading, identifying, where appropriate, citation to local law. Participants are instructed to be thoroughly familiar with the questions(s) they are going to grade and the analyses provided by the Conference in order to take full advantage of the workshop activities.

At the workshop, a session is conducted for each question. A typical schedule is as follows:

Saturday	
Overview	12:30- 1:00
Questions 1 - 3:	
1 (30 min)	1:00 - 3:00
2 (30 min)	1:00 - 5:00
3 (30 min)	3:00 - 5:00
Sunday	
Questions 4 - 6:	
4 (30 min)	8:00-noon
5 (30 min)	8:00-10:00
6 (30 min)	10:00-noon

Facilitators lead discussions regarding each question and proposed analysis, and then each group reviews and assigns grades to a set of answers written to the question by applicants in the jurisdictions administering the MEE. The goals of the workshop, are to identify problems with the

analyses, refine the weights to be assigned to issues, and/or to uncover unanticipated grading problems.

Each of the jurisdictions administering the MEE uses a different scoring method (e.g, 100-point scale, 10-point scale); the following system has been selected for use at the MEE grading workshops:

Score	Description
6	A 6 answer demonstrates a high degree of competence in response to the question. While not reserved for a perfect answer, a 6 answer demonstrates a full understanding of the facts, a complete recognition of the issues presented and the applicable principles of law, and a good ability to reason to a conclusion. A 6 answer is clear, concise and complete.
5	A 5 answer demonstrates clear competence in response to the question. A 5 answer demonstrates a fairly complete understanding of the facts, recognizes most of the issues and applicable law, and reasons fairly welt to a conclusion.
4	A 4 answer demonstrates competence in response to the question. A 4 answer demonstrates an adequate understanding of the facts, and adequate recognition of most of the issues and law, and adequate ability to reason to a conclusion.

3 A 3 answer demonstrates some competence in response to the question but is inadequate. A 3 answer demonstrates a weak understanding of the facts, misses significant issues, fails to recognize applicabie law, and demonstrates inadequate reasoning ability.

2 A 2 answer demonstrates only limited competence in response to the question and is seriously flawed. A 2 answer demonstrates little understanding of the facts or law and Little ability to reason to a conclusion.

1 A 1 answer demonstrates fundamental deficiencies in understanding facts and law. A 1 answer show virtually no ability to reason or analyze.

Following the workshop, revisions to the analyses and/or grading guidelines suggested by workshop partidpants are sent by Federal Express to all persons grading the MEE.

B. Local Grading of MEE

The MEE is not graded at the MEE Grading Workshop. The workshop is a pre-calibration session for the MEE and provides local graders with a starting point in conducting the calibration session (section V - D). The MEE and the state-prepared essay will both be graded using the procedures described in section V-A thru I. At the discretion of the question committee chairperson, all four members of the question committee may participate as graders when grading the MEE because one member did not draft the question.

Utah Bar Examiners Committee Grading Handbook

V. STATE-PREPARED ESSAY EXAMINATION GRADING PROCEDURE

A. Definition of Terms

BENCHMARK PAPERS: Essay answers selected by the readers during the calibration session and used to represent the various score categories used during grading and reappraisal. Graders are to refer to the benchmark answers to refresh their memories regarding the standards set in the calibration session. The benchmark answers will also be published as sample answers after the results of the examination are announced.

CALIBRATION: The method of establishing a single scoring system among several graders on one question.

CORRELATION: A measure of the extent to which a measure on one criterion predicts a measure on another criterion.

GRADING TEAM: Members of each question committee who actually grade examinee responses.

MEAN: Arithmetic average.

STANDARD DEVIATION: A measure of the spread of scores in a distribution.

B. Analysis of the Question

Immediately following the date on which the examination is administered, the examination questions shall be sent to the graders on each question committee. Your first assignment as

a grader is to research all significant legal issues raised by the question you will be grading to verify the issues addressed by the question drafter's model answer. As part of your preliminary research you must prepare a written outline analysis of the issues. Each grader's outline will be distributed to all graders at or prior to the calibration session to facilitate discussion at the session.

C. Grading Overview

The grading process is designed to accomplish three principal objectives:

1. To arrive at a consensus analysis of the question.

2. To calibrate to consistent grading standards.

3. To grade the examination books.

D. Calibration and Grading Sessions

At the calibration session, the members of the grading team compare the outlines of issues that each has prepared and the model answer. The grading team should discuss the issues raised by the examination"question and formulate a consensus model answer and consensus issue outline. Graders are reminded that the analysis prepared by the question drafter is intended for guidance only. A grader must not give undue emphasis to the analysis during the calibration session. After the consensus issue outline and model answer have been prepared, the grading team will read five randomly selected applicant answers to the question without assigning grades. After all members have read these answers, the team will then

discuss any additional issues or problems which have been raised by the review of these answers.

The grading team must agree on the main issues and the resolutions to those issues which are worthy of credit; the graders should agree on how to treat lesser issues which only the most enlightened applicants may recognize. The graders should resolve ambiguities and other problems which arise in the grading process.

After completing the pre-grading procedure, the graders shall individually assign grades to the five answers. The graders should reread the entire answer before forming any opinions as to the grade to be assigned. After reading each individual answer, the grader will assign a grade to the answer according to the grading scale agreed upon. Then the graders will compare the grades assigned to each individual answer and discuss the differences in grading, if any. The discussion is intended to promote uniformity among the graders. The reliability of the grading procedures depends on uniformity. The graders may not agree to disagree. After the first round of answers have been thoroughly discussed, the graders will grade another five examination papers in the same manner, again followed by a discussion of the grades assigned. This will continue until the graders have reached uniformity on the grades which are assigned. The graders are to put no marks on the papers. Papers scored during the calibration session which illustrate the range of score (benchmark papers) shall be selected. The benchmark papers are to be used by the graders during the remainder of the grading session to help the graders maintain grading consistency. This completes the calibration session.

Immediately following the calibration session, graders will continue grading equal portion of the remaining papers during the grading session in accordance with the guidelines that follow in section V-E.

The supervising grader will be responsible for revising the model answer and issue outline in accordance with the consensus of the grading team. The final revised model answer and issue outline, complete with score breakdown will be submitted to the Admissions Administrator no later than the Monday morning following the calibration and grading sessions.

E. Grading Guidelines

1. Refer to benchmark papers often during grading.

2. No marks are to be made anywhere on the answer book. Making the answer book will compromise reappraisal grading which must be done without prejudice.

3. Do not exchange any answer booklets with another reader without the consent of the Admissions Administrator.

4. If you find and answer bookdet for a question other than the one you are grading, please contact the Admissions Administrator immediately who will instruct you on what steps to take. If you find that you are missing a booklet that you expected to be included, contact the Admissions Administrator.

5. Record all grades on the grading sheets and complete the grader certification form.

6. Return all answer booklets in numerical order after randomly grading the answers.

7. Return all benchmark papers to the Admissions Administrator. These are necessary as samples of scored answers for distribution to applicants.

F. Grading Scale

The following grading scale will be used to grade answers on both the MEE and the state-prepared sections of the essay examination:

Score	Description
5	Well Above Average While not reserved for a perfect answer, a 5 answer demonstrates a full understanding of the facts, a complete recognition of the issues presented and the applicabie principles of law, and a good ability to reason to a conclusion. A 5 answer is clear, concise, and complete.
4	Above Average A 4 answer demonstrates a fairly complete understanding of the facts, recognizes most of the issues and appiicable law, and reasons fairly well to a conclusion.

3 Average

A 3 answer demonstrates an adequate understanding of the facts, an adequate recognition of most of the issues and law, and adequate ability to reason to a conclusion.

2 Below Average

A 2 answer demonstrates a weak understanding of the facts, misses significant issues, fails to recognize applicable law, and demonstrates inadequate reasoning ability.

1 Well Below Average

A 1 answer demonstrates little understanding of the facts or law and little ability to reason to a conclusion.

0 Unanswered questions or an unresponsive answer

A 0 answer demonstrates fundamental deficiencies in understanding facts and law. A 0 answer shows virtually no ability to reason or analyze.

No determination of "passing" or "failing" or "minimal competence" should be made while grading the essay examination. Answers are to be scored according to the grading scale. The determination of pass and fail will be made by combining the MEE scaled score and the essay scaled score together as described in section VI.

A score of "5" is not reserved for a psrfect answer or for the single best answer which a grader may encounter. A grade of "5" should be assigned when the grader believes the examinee has done as well as can be expected of any applicant on that question.

If the examinee has shown any understanding of the question and has made a serious attempt to at 1east try to answer it, that examinee should not receive a grade of "0". However, if the examinee has written an answer that almost completely, or completely, unresponsive, a grade of "0" is appropriate.

All papers shall be graded using the whole number "0 - 5" on the grading scale. No paper should receive a fraction of a point, i.e. "3.5", "4.25", "2.75".

G. Failure to Follow the Grading Scale

Unless bar examination graders adhere to the established grading system, a fair and accurate evaluation of applicant performance on the examination is impossible.

H. Reappraisal Grading

Reappraisal grading is used to confirm the essay scores of those applicants who fall in a range just below the passing score. The passing score for the bar examination is a combined scaled score of 130. Applicants whose combined score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers regraded.

The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second

reader assigns the same score as the first reader, that is the score for the answer. If the score assigned by the second reader differs from that assigned by the first reader, the two scores will be averaged together and the averaged score will be the final raw essay score. This score is the score assigned to the applicant.

I. Grader Certification

The grader must sign and date a grader certification sheet and submit it with a copy of the completed grading sheet(s). Copies may be taken from the sample sheets in this handbook or will be distributed by the Admissions Administrator at sequestration.

VI. DESCRIPTION OF SCALING

The Committee of the Bar Examiners has adopted a grading procedure, approved by the Board of Bar Commissioners of the Utah State Bar, designed to assure that the difficulty of passing the bar examination remains unchanged from test to test.

The statistical technique, called scaling, converts scores on the essay section to the same scale of measurement as the MBE. Since the MBE is an "equated" exam (whose scores are adjusted to control exam-to-exam variation in test difficulty), converting the essay section to the MBE scale results in an overall exam which remains at a constant difficulty level, regardless of differences in the leniency of the grading from one exam to the next.

The conversion process involves comparing the distribution of raw scores on the essay exam to the distribution of MBE

scores on that same exam. An applicant's written score is converted in terms of that applicant's MBE score, in technical terms, the written scores are converted to a score distribution that has the same mean and standard deviation as does the MBE score distribution. For instance, a raw essay score that is two standard deviations below the essay mean is placed on a continuum that shows an MBE-Equated score that is two standard deviations below the MBE mean.

Attorney applicants who elect to take the Attorney's Examination (those applicants from out of state who have been admitted five years and have practiced for four of the last five years) also have their essay scores placed on the same scale as general applicants, but as they are excused from the MBE, their pass/fail status is based solely on the essay section.

The level of performance required for passing the Utah State Bar Examination is set at a combined scaled score of 130. The combined scaled score for each applicant is determined by scaling the total raw essay score to the MBE scale and then adding the essay scaled score and the MBE scaled score together for each applicant and dividing by two resulting in the total combined scaled score. This scoring procedure will assure that the same standard for passing is maintained over time. Passing rates will, of course, continue to vary depending upon the ability of the applicants taking the examination.

VII. EXPENSE REIMBURSEMENT

Expense reimbursement is approved for examiners who must travel to Salt Lake City for the calibration session and who live beyond the area typically designated as the Wasatch

Front. Please contact the Admissions Administrator for information regarding the pre-approved hotel accommodations.

Upon receipt of a letter requesting reimbursement, milage is reimbursed in the amount of twenty-five cents for each mile. Please submit your request to the Admissions Administrator.

VIII. EVALUATION

After grading the answers to your question, please complete the following evaluation.

1. What question did you grade?

2. Did you consider this a fair question? An easy question, a difficult questions, or about right?

3. Were there any ambiguities in the wording of the question which misled the applicants? What percentage would you estimate were misled and how?

4. Of the basic issues covered in your issue outline, were any overlooked or inadequately treated by a substantial percentage of applicants? Which issues? By how many applicants?

5. Were there any issues not included in your issue outline that were raised by a significant number of applicants? Now did you treat them in your grading?

6. Did the question present any unusual grading problems? What were the problems?

Do you have any comments or recommendations regading the grading process?

UTAH STATE BAR

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1-800-698-9077
FAX 801-531-0660
www.utahbarorg

GRADER CERTIFICATION

I certify that the scores appearing on the attached grading sheets for the _____ Examination are the scores, which I have assigned to the answers designated.

_____
Signature

_____
Name Printed

_____
Date

_____
Question #

APPENDIX N

BAR EXAMINATION REVIEW AND APPEAL PROCEDURE

Revised March, 1991

Any person who has failed to pass the Utah State Bar Examination may, within 30 days after service of written notice thereof, file a petition with the Executive Director of the Utah State Bar directed to the Board of Commissioners, requesting a review of the determination that petitioner has failed the Bar Examination. The petition shall contain a short and plain statement of the claim showing that the petitioner is entitled to relief based on Rule 11-2 of the Rules Governing Admission to the Utah State Bar. Relief shall be granted only upon showing that the petitioner failed the examination because of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process. The Board of Bar Commissioners and/or any review committee designated by it shall not reread examination answers or substitute their judgment for that of the Committee of Bar Examiners.

Unless the President of the Utah State Bar appoints a special review committee, the review committee shall consist of no more than three (3) members of the Admissions Standing Committee.

The review committee shall review all relevant evidence and my conduct a hearing if necessary. The

chairperson of the review committee shall notify the petitioner and the Admissions Administrator in writing of the time and place set for the hearing, if one is required. Petitions setting forth common issues my be consolidated in whole or in part as determined by the chairperson of the review committee. After completing its review, the review committee shall file with the Board of Commissioners its written findings of fact and recommendations on all petitions. The Board of Commissioners shall make its decision on each petition and shall notify each petitioner in writing of its decision and of the findings of fact upon which its decision is based.

Within thirty (30) days after service of the findings and decision upon the petitioner, or counsel for the petitioner, the petitioner may appeal to the Supreme Court of the State of Utah by filing a written notice of appeal with the Clerk of the Supreme Court. The notice of appeal shall contain those items listed in Rule 3(d) of the Utah Rules of Appellate Procedure and a statement of the basis for the appeal. A copy of the notice of appeal shall be served on the Executive Director of the Utah State Bar. The record of the proceedings shall be prepared by the Executive Director and shall be filed with the Clerk of the Supreme Court within fifteen (15) days following the filing of the notice of appeal. The Supreme Court shall treat the appeal according to the Utah Rules of Appellate Procedure.

The procedure set forth in this rule shall be the exclusive remedy for review of or appeal from the refusal of the Bored of Commissioners of the Utah State Bar to certify any applicant for admission to the Utah State Bar for failure to pass the Utah Sine Bar Examination. No appeal or original

petition will be accepted by the Clerk of the Utah Supreme Court unless the requirements, of this rule have been met.

All notices and service shall be sufficient if mailed by regular mail, postage prepaid, to the person designated at his or her address as shown by the records, of the Utah State Bar. Notice shall be deemed given on the date of mailing.

APPENDIX O

To: Carolyn Montgomery, Attorney at Law
From: David J. Gustafson, M.S

Date: May 10, 2001

Background Information on Licensure Examinations

Licensure examinations are often evaluated in three domains: reliability, validity, and fairness. Reliability refers to consistency, such as whether an examination candidate would tend to get the same score on the exam if the same examination is given on a second occasion. A "valid" examination (high validity) measures what it is supposed to measure. Finally, issues of fairness are related to how an administrative agency treats a candidate in the examination process, such as whether identified groups of people are disadvantaged by the examination process.

The elements of a licensure examination to undergo scrutiny in these three domains are typically the items (questions), additional materials or exhibits presented with the items, manuals or other materials that describe an examination, the instructions, conditions of administration including time limits, security, scoring methods, review and correction procedures, examination specification procedures, examination reporting, criteria setting procedures and examination specification (blueprint).

The completeness of examination descriptions is important. Failure to describe methodologies and data relating

to reliability, validity, and fairness leave reviewers believing that an examination is less reliable and/or valid than it may be. Procedures and findings that are that are not described are typically assumed to be absent. The reviewer of an examination may describe the lack of evidence of the reliability, validity, and fairness of a given examination when documentation is limited in these areas.

As a rule, examinations are neither 100% reliable nor 100% valid. Examination termed "reliable" or "valid" are examinations with "sufficient" indications of reliability or validity. Some reviewers may avoid suggesting an examination is either "reliable" or "valid," describing instead the threats to the reliability and validity of an examination and perhaps suggesting an examination with sufficient threats is either "invalid" or "unreliable."

There are a number of different types of reliability, all addressing consistency. "Test-retest reliability" refers to the consistency or likelihood that a candidate will obtain a similar score if given the same examination on a second occasion. "Interrater reliability" is a measure of the degree to which two or more raters get the same results when scoring the same examination.

Validity refers to whether examination scores measure what they are supposed to measure. Validity is usually asserted through a number of descriptions and indexes describing the attempts of the examination development process to make an examination that measures what it is supposed to measure. There are a number of different types of validity such as "content validity," "criterion validity," and "construct validity." Content validity is typically asserted based on having a group of experts review the items on the

examination, preferably in a structured fashion. To maximize "criterion validity," ideal and/or minimum competence standards for essay examinations are prepared and examiners are trained and evaluated on their consistency in rating these standards. This processes is called standardization of examiners. The assertion of "construct validity" is done in a broad fashion, demonstrating that the test is developed in such a fashion that it measures what it is supposed to measure. One may include "job-task analysis," "structured expert review," "factor analysis," and a variety of other techniques to assert "construct validity."

Considering restraint of trade issues, it is assumed that all people have the right to practice a profession except where the health, safety, and welfare of the public is threatened by potential "incompetent" practitioners of the field in question. Thus, in licensure testing, it is often assumed that the purpose of the examination is to protect the health, safety, and welfare of the public. Items and procedures that do not focus on this purpose are assumed to reduce the validity of the examination.

Licensure examinations are designed to measure "minimal competency." "Minimum competency is typically the basic standard for passing an examination. This refers to just beyond "incompetent," still competent, but definitely on the low side.

A "cut-score" refers to the minimum score that a candidate needs to achieve in order to pass an examination. In licensure examinations this score is properly set based on the concept of minimum competency. It is mathematically assumed that the minimally competent candidates scores at or above the cut-score and those who fail to perform at a

minimally competent level score below the cut-score and thus fail the examination. Standard setting or cut-score workshops may be used to set cut-scores from a given set of examination items prior to an examination administration.

Reliability is a necessary but not sufficient condition for validity. For example, if candidates for a law examination were instead given a well-developed medical examination then the results may be reliable but not valid. Assuming law candidates with higher medical knowledge consistently obtained higher average scores than candidates with less medical knowledge then this may be a reliable examination; however, it is clear that an evaluation of medical knowledge is not relevant to a state bar examination. In this example, the examination is reliable but not valid. On the other hand, any examination in which the test-retest scores are too inconsistent (unreliable) does not measure what it is supposed to measure (invalid). Decreasing reliability leads to increases in the errors (false pass & false fail) of an examination, leading to a greater number of arbitrary decisions.

The construction and standard setting for a licensure examination may be accomplished through either norm-referenced or criterion-referenced theories and methods. Both have advantages and *disadvantages* and both are nationally used for various licensure examinations. Both methods require high quality criterion setting, a difficult process.

"Norm-referenced" testing is often based on the normal curve (bell shaped curve). Norms are obtained by looking at the performance of groups of people and looking at their percentile rankings. For example, a person whose score is lower than 25% of the norm sample and higher than 75% of the norm sample is in the 75th percentile. College

entrance examinations are often reported in this fashion. Standardized scores such as the Utah law examination use "norm referencing" which assumes candidate's scores are normally distributed and relates the score to the position above or below the mean of the norm group based on the standard deviation of the scores. Norm-referenced testing is often easier to construct than criterion-referenced testing; but, appropriate norms (standards) are often hard to determine.

"Criterion-referenced" testing is based on establishing fixed performance standards. A simple example would be an examination where candidates were required to get 75% of the items correct to pass the examination. This method is used in schools, but it is too limited for use in most licensure examinations. Percent correct methods do not compensate for varying difficulty levels of items. Typically criterion-referenced standards are established through performance testing and expert review. Items are evaluated for the determination of "minimal' competency." One approach to criterion referenced cut-score or standard setting is to have experts rate each item to be tested based on such things as the proportion of minimally competent candidates expected to get this item correct (Angoff Method). In general, criterion referenced testing is preferable for licensure testing, with its emphasis on "minimal competency."

A number of fairness issues can arise in licensure testing. Fairness encompasses a broad set of issues. For example does an examination adversely impact any ethnic minority group or grouping based on national origin? Is the examination constructed in a fashion that disadvantages a given gender? Are special provisions made for handicapped applicants? Are applicants who receive their training from certain schools disadvantaged in the examination process in a

way that is unfair? Are examination items included that are not related to protecting the health, safety, and welfare of the public that provide an advantage to some candidates and a disadvantage to other candidates that are not related to competency?

Issues related to the current case

When the Utah Bar Examination is specified as having twelve items and one item is subsequently deleted due to defects, what are the implications?

> Based on a review of the Utah Bar examination procedures, the eleven remaining items are more heavily weighted than originally specified. Defective items may cause additional stress and poorer performance expectations for candidates taking an examination even if these items are eliminated. If a given candidate does better than average on an eliminated item then that candidate's performance on this item does not improve their overall score. If the eliminated item measures an important topic area then elimination of this topic would be expected to reduce the validity of this examination. Twelve items are a very small measure of the breadth of law and any further reduction in the number of items may further threaten the validity of this examination. In addition, reducing the length of an examination, all other things being equal, reduces the reliability of scores from that examination. (Possible failure to

follow the prescribed specifications is a legal issue and will not be addressed here.)

Would a specified proportion of candidates be expected to pass and fail the Utah Bar examination, regardless of the difficulty level of the examination and the performance level of the candidates? If so, what are the implications?

Yes, the use a norm-referenced cut-score or minimum passing score establishes a fixed proportion of the candidates who are mathematically expected to pass or fail the examination, regardless of the competency level of the candidates. [The actual number may vary somewhat due to tie scores, outliers (extreme scores), or the shape of the obtained distribution of scores.] To properly set a norm-referenced cut-score one has to know what proportion of the candidates are competent. Is the cut-score based on studies of "competency?" Without a description of method or studies, it is difficult to evaluate the validity of a given cut-score.

Of particular concern in licensure testing is the seasonal effect of examination testing upon examination difficulty level. In many professions, licensure examinations are given twice per year. Often the first examination is administered after graduation and the second examination is given about six months later. Usually, the six-month examination has a greater proportion of failing candidates (retakes). In the Utah Bar Examination the

same proportion of candidates would be expected to pass both administrations. If candidates perform (on the average) lower on the six-month examination (due to more retakes) then it is easier to pass this examination than it is to pass the examination following graduation. In summary, the competency level required to pass this examination varies from occasion to occasion and is based upon the average performance level of the candidates as a whole.

It is given that between fifty-six and eighty-four examiners are used to score a twelve item written essay examination like the Utah State Bar Examination and that there are two hundred and thirty-two candidates with scoring during an eight hour time period. Candidates are allowed a total of six hours to complete the 12-item examination, or 30 minutes per item. Is enough time provided for the examiners to score the examination in a reliable and valid fashion? In addition, if one were to assume that three hours of the time was spent on examiner training, standardization, and other non-grading activities, would there still be enough time for the examiners to score the examination in a reliable and valid fashion?

The maximum scoring time provided for the full time period would be calculated as follows:

Maximum time per item =

$$\frac{(84 \text{ examiners}) \times (8 \text{ hours}) \times (60 \text{ minutes/hour})}{(12 \text{ items/exam}) * (232 \text{ exams})}$$

Maximum time per item = 14.5 (examiner-minutes)/item

The minimum scoring time provided would be calculated as follows:

Minimum Time per item =

$$\frac{\text{(56 examiners) x (8 hours) x (60 minutes/hour)}}{\text{(12 items/exam) * (232 exams)}}$$

Minimum Time per item = 9.7 (examiner-minutes)/item

The maximum scoring time provided for the limited time period would be calculated as follows:

Maximum time per item =

$$\frac{\text{(84 examiners) x (8 hrs - 3 hrs) x (60 minutes/hour)}}{\text{(12 items/exam) * (232 exams)}}$$

Maximum time per item = 9.1 (examiner-minutes)/item

The minimum scoring time provided would be calculated as follows:

Minimum Time per item =

$$\frac{\text{(56 examiners) x (8 hrs- 3 hours) x (60 minutes/hour)}}{\text{(12 items/exam) * (232 exams)}}$$

Minimum Time per item = 6.0 (examiner-minutes)/item

The calculated time ranges are from 6.0 to 14.5 minutes per examination item. It seems most likely that examiners spent less than an average of 10 minutes grading each essay, based on time spent with standardization, training, breaks, and lunch. Pilot testing would be necessary to determine the average time requirements for this examination. Time requirements would be determined in part by the care and reading speed of the individual examiners. This appears to be a very short period to complete this task, less than 1/3 the time the candidates had answering each item. For example, if the average candidate wrote a five page answer to each item then the examiner might have about 2 minutes per page to read, reread, consider criteria, and prepare a grade. If the examiners had too little time to score the essay examination then the reliability of the examination would be expected to suffer. Of particular concern would be a situation where the examiner had to grade much faster at the end of the day to complete his or her work. These later scores would then be expected to be less reliable than earlier scores. Based on my experience, this appears to be far too short a time period for examiners to render reliable judgments on candidates' essay examination items.

Report of David J. Gustafson - 5/10/01

Is it good testing practice to score licensure essay items with just one examiner? Describe any implications to this practice.

It is not generally an ideal practice to have only one examiner score each examination item. On examinations that are subjectively scored (such as essay items), it is good practice to have at least two, if not more, examiners score each item. The major disadvantage of one examiner is that one has no idea of the reliability and validity of the rating. If one has two examiners then one can set standards for how close the two should be in their answer. If the two scores are too dissimilar than an additional examiner or examiners may review the item to resolve the scoring. In addition, with two or more examiners, interrater reliability can be calculated on an ongoing basis. These calculations provide indexes of how well examiners remain standardized and describe possible temporal effects, such as are the examiners harder or easier during different times of the day. With only one examiner there is no way to measure interrater reliability and therefore the reliability of a single rater is always suspect.

Suggestions for Possible Improvements of the Examination Process

1. A psychometric review could be undertaken to describe the current examination process. This could provide information to develop a candidate's manual

and identify current strengths and weaknesses of the examination. It may be useful to obtain ongoing psychometric assistance with the examination process.

2. Based on both expert psychometric and expert content review, determine any changes in the examination process.

3. Develop a blueprint for the content of the examination based on "job-task analysis" or structured expert review. Consider tying this blueprint to selecting content focused on protecting the health, safety, and welfare of the public.

4. Increase the available documentation of the current examination process.

5. Develop a more systematic review process for creating and reviewing potential examination items. Items can be rated with schemes that determine that they are related to protecting the health, safety, and welfare of the public.

6. Consider using criterion referenced testing and cut scores (minimal passing scores).

7. Develop procedures and guidelines for throwing out examination items that consider issues of fairness.

8. Conduct cut score workshops and/or studies to support the current or a revised cut score.

9. Consider revising the rating system for grading essay items. Since essay items are notorious for having poor

interrater reliability, the methods and procedures for an essay examination need more care in their construction than do many other types of examination items.

10. Develop procedures for standardization of raters and the collection of interrater reliability for scorers of essay items. Interrater reliability data can be collected on an ongoing basis. In cases where raters disagree on a candidate, additional rating can occur. Consider providing ample time and written criteria for graders to score examinations. The time requirements can be set through pilot testing with examiners.

APPENDIX P

VITA

David J. Gustafson

HOME ADDRESS

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PERSONAL DATA

Date of Birth: April 3, 1947
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EDUCATION

California State University, Los Angeles, B.A. in Psychology, September 1972

Florida State University, Tallahassee, M.S. in Psychology (Experimental), December 1975.

Additional Coursework pursuing Ph.D. in Clinical Psychology and completing a minor specialization in statistics, measurement, and experimental design were taken.

Vita of David J. Gustafson

EMPLOYMENT AND CONSULTING EXPERIENCE

Florida State Hospital, Chattahoochee, Florida
(1988-Present)

Psychological specialist performing research and clinical duties with civil and forensic psychiatric populations. Includes development of instruments, surveys, psychological testing, clinical work, and computer applications in psychology. Constructed a database system for recording and summarizing outcome measures in mental health. Awarded Davis Productivity Award for individual performance as an employee of the Florida Department of Health and Rehabilitative Services in 1992. This is a statewide award given yearly to a few individuals for top productivity in the Department of Health and Rehabilitative Services.

Department of Children and Families,
Adult Mental Health Program Office
(1996-Present)

Measurement consultant to adult mental health program office. Developed quality review instrumentation for evaluating all of Florida's psychiatric hospitals as well as serving as a quality review team member. Additional activities include membership in a task force to develop uniform outcome measures to be used to evaluate Florida's state psychiatric hospitals. On the Brain trust committee that resolves statewide statistical and measurement issues.

Information, Learning and Testing, Inc.
(1989-1993)

President of a consulting firm that provided testing, computer, and research services. Contracts have included Florida Laboratory Personnel licensure examination and Florida Department of Professional Regulation. This project included development of an examination scoring and scanning program as well as providing measurement consulting and standard-setting workshops to the department. Additional projects included consulting with state agencies and national testing firms, as well as consulting to the Macarthur foundation for a longitudinal study of forensic patients.

Tallahassee Community College
(1989-Present)

Have taught on a part time basis, typically two psychology courses per semester. Provided consulting and staff development seminars in test development and the utilization of computers in academic activities. Developed an academic website (http://faculty.cc.fl.us/hss/.gustafsond) for teaching psychology.

Wellsprings Home Health Care Services, Inc.
(1988-1989)

Administrator and management consultant to a home health care agency that provided nurses and home health aids in Franklin County. At that time, Wellsprings was the only licensed provider of Medicare home health services in that county. Also, was a stockholder and secretary-treasurer of the board of directors of this agency. During this time was on the board of directors and business manager of Wellsprings Walk-

In Medical Clinic, as well as the business manager of a 40-bed Adult Communal Living Center.

Columbia Assessment Services, Inc.
(1987-1988)

Vice President in charge of Research and Development, also testing consultant for this nationwide licensure testing company. Responsible for development of company procedures, recruitment of new business, data processing, as well as psychometric tasks. These tasks included innovative testing methods, measurement, and computer applications. Worked with the CEO to initially develop this successful organization.

ACSI (subsequently renamed as
National Assessment Institute)
(1983-1987)

National Director of Measurement and Evaluation for a company that had offices in five states and contracts for licensure examination development for a variety of professions. Responsible for the computerized scoring of exams and technical consulting in measurement and examination development. Have developed a variety of state and national licensure examinations, written proposals, presented talks to state and national organizations, evaluated state licensure programs. Was a consultant to the national Architects examination research and development committee.

U.S. Department of Justice and U.S. Department of Corrections (1983-1984)

Consultant to the National Institute of Justice (NIJ) for a national study of stress in police women, funded by the Justice Department. Developed instruments to measure stress and other psychological constructs in law enforcement officers. Also conducted design and data analysis for the study and performed site visits to police departments across the country. Also, worked for the U.S. Department of Corrections (DOC) to evaluate stress in correction officers in the state of Iowa. Provided a state evaluation with recommendations to the state for improving the working conditions of correctional officers. Results presented to the Secretary of Corrections in Iowa were adopted as new procedures and policy for State correction officers.

Florida Department of Professional Regulation (1980-1984)

Worked as a staff examination developer and subsequently as a consultant in measurement and an expert witness in testing. As a staff member for 3 3/4 years was responsible for the technical development of up to one third of Florida's licensure examinations. Responsibilities included examination development, instrument validation, site auditing of national examinations, exam reporting, and training and supervision of content consultants who were licensed in the various professions. Additional responsibilities included serving as an expert witness at hearings, providing guidance to professional members of licensure boards, performing budgetary analysis, developing examination administration procedures.

State of Florida, Department of Education
Innovative Programs Office, Title IV-C
(1979)

Served as a management and evaluation auditor for the Department and conducted audits of selected programs.

Leon County Schools
(1977-1979)

Program evaluator for two Title IV-C funded educational programs in the middle schools (Nims Title IV-C and the Gifted Child Project). Developed evaluation design, developed instruments, analyzed data, and prepared process and program evaluations.

Wakulla County Schools
(1977)

Designed the program evaluations, conducted needs assessments, and developed evaluation instruments for a Title IV-C project.

RECENT CLINICAL PSYCHOLOGY EXPERIENCE AND TRAINING

Clinical Psychology Training Program
Florida State University
(1992-1996)

Have completed four years of graduate study in clinical psychology at Florida State University, completing the APA specified Ph.D. coursework, aside from the internship and a paper requirement. At the FSU Psychology clinic, have

provided psychotherapy for over three years with a diversity of clients utilizing a number of different theoretical approaches including: insight-oriented, behavioral & cognitive behavioral, strategic, family systems, and hypnosis. Testing experiences at the FSU clinic included the use of WAIS-R, WISC-III, MMPI-2, MMPI-A, 16PF, Rorschach, TAT, Woodcock-Johnson Cognitive & Achievement, WRAT, TRF/CBC, Bender-Gestalt, and Halstead-Reitan.

EASTER SEAL
(1996)

Have performed assessments for Vocational Rehabilitation clients. These included academic, intellectual, and personality evaluations for use in vocational assessment. Have completed over 60 batteries including psychological reports.

FSU Regional Multidisciplinary Center
(1993-1995)

Provided assessments for specific learning disabilities for children and adults. Conducted assessments for Attention Deficit Hyperactivity Disorder in children and adults. Testing experience included the utilization of the WISC-III, WAIS-R, Stanford-Binet, Woodcock-Johnson Cognitive & Achievement, CPI, CBC/TRF, Bender-Gestalt, Weschler Memory, Memory Assessment Scale, Roberts Apperception Test, TAT, Incomplete Sentence, Matching Familiar Figures Test, standardized behavioral observation, and a variety of ADHD checklists. Throughout this time, provided between one and two comprehensive psychological batteries per week with accompanying psychological reports.

Vita of David J. Gustafson

Tallahassee Pain and Stress Management Institute
(1983-1986)

Associate in private practice at the institute. Was licensed as a mental health counselor. Responsible for developing treatment programs, seminars, and grants. Performed therapy for clients with psychological problems, stress disorders, and pain (both functional and organic disorders). Treatment modalities included behavioral methods, goal-oriented insight therapy, hypnosis, and biofeedback.

Appalachia Community Mental Health Services Inc.
Emergency Services
(1980-1983)

Employed as a staff member on the crisis team. At this time, the crisis team served as the primary emergency evaluation service for involuntary commitment and crisis intervention in Leon County Florida.

Additional Employment

Have worked as a program evaluator in the California Schools from 1970 through 1974, as well as consulting to the State of California Department of Education task force on Bilingual Bicultural Education. Worked as a counselor at Ingleside Mental Health Center in Rosemead, California from 1969 to 1970. Conducted adolescent and adult groups and developed a treatment method (token economy) at this institution.

Vita of David J. Gustafson

Teaching Experience

Tallahassee Junior College
(1989-2001)

Instructor of psychology. Typically taught two courses each semester in personality and social adjustment.

Florida State University
(1972-1977)

Taught introductory psychology and directed undergraduate managers to teach this course (five quarters: two or more sections per quarter). In addition, have taught and served as a graduate assistant for sensation and perception course: Additional courses taught were computer methods in psychology, introductory statistics, biofeedback, and a graduate seminar in multivariate statistical techniques.

Lake City Junior College
(1974)

Instructor of psychology. Taught two courses, introductory psychology (two sections) and educational psychology (two sections).

Other

Have presented workshops, colloquia, seminars, and lectures on a variety of topics, including various testing, computer, statistical, teaching methods, stress, and biofeedback. Audiences have included combined professional licensure boards for Florida, television, and radio audiences, departmental faculty & students, teachers & principals at

schools, as well as law enforcement personnel. Have been a featured speaker at national and state association meetings.

Areas of Interest and Competency

Information Technology

Have developed extensive and diverse computer skills. Programming languages include Delphi (Pascal), C++, SQL, Visual-Basic, Fortran, Cobol, HTML and it's derivatives, Java-Script, Java, Squeak (SmallTalk), Prolog, various assemblers, and various operating systems. Currently commercializing a number of programs in statistics, sampling, web development, and graphics. Activities have included database design, real-time control & data acquisition for scientific experiments, statistical program design, programming for optical scanners, decision support systems, data warehousing, expert systems, Monte Carlo simulations and some artificial intelligence and neural networks. Extensive knowledge of many applications packages including word processing, spreadsheet, database, statistical analysis, web design, and graphics & media. Have taught college level course in programming. Designed a database warehouse for mental health outcomes for a large state facility, as well as collaborated in the database design for a statewide mental health outcome data warehouse. Have provided training and consulting in ACCESS, EXCEL, SPSS, and many other applications.

Statistics and Experimental Design

Have utilized, consulted, and instructed others in the use of a variety of parametric, non-parametric, univariate, and multivariate statistical techniques including: analysis of

variance (ANOVA), analysis of covariance (ANCOVA), multivariate analysis of vadance and covariance (MANOVA & MANCOVA), the general linear model (GLM), structural equation modeling (LISREL), exploratory and confirmatory factor analysis, cluster analysis, linear and nonlinear regression, discriminative analysis, time series analysis, and exploratory data analysis (EDA). Have performed hundreds of data analyses for a number of different clients ranging from national and state agencies to the analysis of dissertation data for a many doctoral students. Have taught multivariate statistics to doctoral students. Published articles in scientific journals based on statistical analyses or statistical topics. Extensive background in experimental and quasi-experimental design. Long history of consulting in experimental design for institutional, scientific, evaluation, and action research.

Measurement

Worked as an examination developer for both a state agency and a national firm developing licensure examinations in a variety of disciplines. Developed both written examinations and practical (simulation) examination for many health care, psychological, business, and trade professions. Have also developed or consulted on the development of numerous psychology and program evaluation instruments, ranging from measures of obsessive compulsive characteristics to a constellation measure of family interaction patterns. Instruments developed include surveys, achievement tests, consumer satisfaction, licensure examinations, personality inventories, observational methods, and in-basket tests. Have provided measurement consulting to many state agencies across the country as well as national agencies. Have presented measurement workshops and talks to a number of

state and national organizations. Served as an expert witness in measurement and test development on various occasions.

Program Evaluation and Experimental Design

Performed program evaluations for various school districts, state and local mental health agencies, and national agencies. Developed both process (formative) and product (summative) evaluations, and have developed and conducted program audits. Evaluation activities have included evaluation design, selection and development of instruments, ongoing process evaluation, ongoing formative feedback to program staff, design of data collection schemes, data analysis, and written & oral presentation of results. Recently collaborated in the development of a system to evaluate state hospital compliance with best practices and statutory requirements. This system is driven by a semiannual audit team visit with chart and other record review, performed in a fashion that is similar to the accreditation system used to evaluate hospitals. On a national level have participated in a study of stress in policewomen, for the U.S. Department of Justice, and have performed an evaluation of the profession of correctional officers for the State of Iowa and the U.S. Department of Corrections.

Communication Skills and Experience

At the college level, have taught a number of psychology courses including: general psychology, sensation and perception, personality & adjustment, educational psychology, methods and experimental design. Have also taught a graduate course providing a general data analytic model that integrated univariate and multivariate techniques entitled "strategies of data analysis." Have also taught computer programming. My teaching incorporates instructional design and utilizes

instructional websites. (See current teaching site at: http://faculty.tallahassee.cc.fl.us/hss/gustafsond.) Have given talks to a variety of professional and lay audiences, as well as trained, consulted and presented workshops. Consistently described and rated as an exceptional communicator by others. Collaborated in writing a number of grants, many were funded. Have written a number of multimedia documents including a recent self-help e-book for evaluating relationships based on social exchange theory.

Graphic Arts and Media

Experienced with a variety of computerized graphic arts and media packages including desktop publishing, web design, e-books, raster & vector drawing programs, computer animation, and acoustic & musical programs. In addition, have been trained in music and have extensive experience in still and video photography, including darkroom techniques. Currently use digital photography and a variety of media and graphical techniques to enhance work products. Have been recently developing commercial websites.

Publications/Presentations

Articles

Ralston, D.A., Cunniff, M.K., & Gustafson, D. J. (1995). Cultural Accommodation: The Effect of Language on Values of Bilingual Hong Kong Chinese Managers. Journal of Cross-Cultural Psychology, 26, 714-727.

Ralston, D.A., Terpstra, R.H., Cunniff, M.K., & Gustafson, D.J. (1995). Do Expatriate Managers Change Their Behaviors to Fit a Foreign Culture? A Study of

American Expatriates' Strategies of Upward Influence. MIR-Management International Review, 35, 109-122.

Ralston, D. A., Gustafson, D. J., Terpstra, R H., & Holt, D. A. (1995). Pre-post Tiananmen Square: Changing values of Chinese managers. Asia Pacific Journal of Management, 12, 1-20.

Ralston, D. A., Gustafson, D. J., & Terpstra, R. H. (i1992). Eastern Values: A comparison of managers in the United States, Hong Kong, and the People's Republic of China. Journal of Applied Psychology, 77, 664-671.

Ralston, D. A., Gustafson, D.J., Terpstra, R. H., Holt, D.H., Cheung, F. & Ribbens, B. (1993). The impact of managerial values on decison making behavior: A comparison of the United States and Hong Kong. Asia Pacific Journal of Business, 10, 21-37.

Ralston, D.A., Gustafson, D.J., Mainiero, L. & Umstot, D. (1993). Strategies of upward influence: a cross-national comparison of Hong Kong and U.S. Managers. Asia Pacific Journal of Business, 10 33-51.

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No. 02-629

IN THE

Supreme Court of the United States

KATHLEEN G. ARNOVICK, VALERIE L. COX,
and HENRY B. WANSKER,

Petitioners,

v.

UTAH STATE BAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Utah Supreme Court properly find that Petitioners' due process and equal protection rights were not violated by the Utah State Bar Examination Process?

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STATEMENT OF THE CASE

Petitioners were among the 232 applicants who took the July 2000 Utah Bar Examination ("Bar Exam"). They were not among the 204 applicants who passed. Generally, there are 12 essay questions on the written portion of the two-day exam. Essay questions are either prepared by the Bar's Examiner Committee or prepared by the National Conference of Bar Examiners in the format of Multistate Essay Examination ("MEE") questions that are available for purchase. After administration of the July 2000 Bar Exam, the grading committee met in a process called "sequestration". The grading committee assigned to grade the torts question attempted to conduct the required scoring calibration procedure. The grading committee determined that the torts essay question was defective because it did not fairly assess the examinees' knowledge. The graders consulted with the Bar's General Counsel and Admissions Administrator who consulted with the Director of Testing for the National Conference of Bar Examiners and the torts question was eliminated from consideration. The remaining 11 essay questions were graded as usual.

The Utah State Bar provides an extensive three-level appeal procedure for unsuccessful examinees. Petitioners elected to file grievances after learning that they did not pass the July 2000 Bar Exam. The Bar's Admissions Committee, the Board of Bar Commissioners and the Utah Supreme Court all subsequently considered Petitioners' panoply of claims which ranged from the alleged assignment of identifiable test numbers to claims that the essay questions contained too many issues to identify and answer within the allotted 30 minute time period, in addition to violation of their constitutional rights. The Utah Supreme Court determined

that in constructing, administering and grading the July 2000 Bar Exam, the Bar did not violate Petitioners' rights to due process and equal protection. *See In re Arnovick*, 52 P.3d 1246 (Utah 2002).

CLARIFICATION OF THE RECORD

Petitioners' brief contains several misstatements of fact packaged with misleading implications and omissions. First, the most critical misstatement is the assertion that the Bar Exam is a "norm-referenced test." It is not. A norm-referenced test uses "curving" or a "bell curve" to determine success or failure by reference to the overall performance of the test-taking group rather than in reference to a predetermined standard of performance. A norm-referenced test will always have a fixed percentage of failing examinees. In contrast, the essay portion of the Bar Exam is criterion-based and designed to test minimal competency. Grading of the essay portion is based upon the quality of each individual's answers when compared to a model answer that serves as the predetermined standard. In other words, the more closely an examinee's answer approximates the model answer, the higher the grade on a zero to five point scale. Petitioners rely upon a report by David Gustafson to establish that the Bar Exam is a norm-referenced test. (Pet. App. at 159a-171a.) The report does not provide any factual basis for that conclusion let alone mention the grading committee's use of a model answer. The Utah Supreme Court characterized Mr. Gustafson's report as, "an unreviewed and unsubstantiated statistical analysis. . . ." *Arnovick* at 1249.

Second, another misstatement of fact is that six of the essay questions on the July 2000 Bar Exam were MEE questions and that these answers were graded differently than

the Utah state-prepared essay questions. Neither assertion is accurate. There were only five MEE questions on the Bar Exam and they were graded in the same fashion as the state-prepared essay questions in accordance with the Utah Bar Examiners Committee Grading Handbook: "The MEE and state-prepared essays will both be graded using the procedures described in section V-A thru I." (Pet. App. at 144a.)

Third, the Utah Supreme Court did not, as asserted, "concede that the Petitioners' criticisms of the Bar's grading procedure were mathematically convincing." (Pet. at 8-9.) Petitioners' citation is actually to the parenthetical description of an Alaska (not Arkansas, as attributed) Supreme Court decision. (Pet. App. at 5a.)

Fourth, in examining Petitioners' constitutional claims, the Utah Supreme Court did not, "determine the conduct of the Utah State Bar to be *excusable* (emphasis added)." (Pet. at 2). A cursory reading of the *Arnovick* decision reveals that after analyzing Petitioners' arguments and the facts, the Utah Supreme Court concluded that any alleged irregularities in the testing process, even if true, simply did not rise to the level of a constitutional violation.

Fifth, Petitioners construct a new legal theory not raised below and built on the alleged fact that the Bar Exam was a "state administered professional licensing examination." (Pet. at 2.) The Utah State Bar is not a state agency charged with administering professional licensing tests. The Bar is a § 501(c)(6) corporation that operates under a delegation of authority from the Utah Supreme Court. *Barnard v. Utah State Bar*, 804 P.2d 526, 529-30 (Utah 1991) discusses that the Bar's participation in the admission and lawyer discipline processes does not transform it into a public agency.

Sixth, Petitioners state that the Bar improperly refused their requests for information relating to the Bar Exam. In fact, the Rules Governing Admission only require that unsuccessful applicants be provided copies of the exam essay questions, copies of the applicant's answers and copies of the exam's model answers. The Bar provided not only the required information, but additional documentation as evidenced by a copy of the Utah Supreme Court's Record of Proceedings (docket) sheet. (App. B.) Among that information was mathematical and statistical documentation describing what the Bar uses in the grading process, including the scaling of scores, and a general description of the process by which the Bar composes essay questions. The Bar did not provide requested information that was confidential or too burdensome to produce and which was not required under the Rules Governing Admission: the identity of graders and their professional qualifications and training, and the raw essay scores and raw Multistate Bar Examination scores for every applicant taking the July 2000 Bar Exam.

Finally, Petitioners omit the fact that one of them, Kathleen G. Arnovick, later took and passed the February 2001 Bar Exam.

REASONS FOR DENYING THE PETITION

The Petitioners raise constitutional issues of due process and equal protection to avoid review of their performance on the Bar Exam. The Petition presents no compelling reason to invoke the discretionary jurisdiction of this Court.

I. POOR TEST PERFORMANCE AND LOW TEST SCORES RATHER THAN VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION ACCOUNT FOR PETITIONERS' LACK OF SUCCESS ON THE BAR EXAM

In an attempt to focus this Court's attention on something other than their own poor performance on the July 2000 Bar Exam, Petitioners proclaim at the outset that, "[u]nlike virtually any other such challenge, the performance of the Petitioners is not at issue here." (Pet. at i.) Poor test performance and low test scores, however, are the reason for Petitioners' failure. They took the same test under the same conditions as did 229 other applicants. A score of 130 was required to pass. The average score for all applicants was 147.69 and nearly 90% of those taking the July 2000 Bar Exam were successful. (App. A.) Petitioner Wansker scored 120.94 (18.1% below average); Petitioner Arnovick scored 126.39 (14.4% below average); and Petitioner Cox scored 127.81 (13.46% below average). (App. A.) Petitioners argue violations of due process and equal protection to shift the blame for their below passing level performance on the Bar Exam.

Bar exam procedures are reviewable when due process or equal protection claims are raised. However, courts uniformly have found that the Constitution does not require

a perfect test nor does it require perfect examiners. In bar exam contexts, the Constitution requires only a rule of rationality. *See, e.g., Graham v. Ohio Bd. of Bar Exam'rs.*, 649 N.E.2d 282 (Ohio 1994), *cert. denied, Graham v. Mengel*, 516 U.S. 867 (1995) (alleging, in pertinent part, that bar examiner grading instructions so defective as to render exam results incapable of measuring applicant's ability to practice law); *In re Dennis T. Reardon*, 378 A.2d 614 (Del. 1977) (failing applicants unsuccessful appeal of bar's choice of treatment of flawed essay question); *Hooban v. Washington State Bar*, 539 P.2d 686 (Wash. 1975), *appeal dismissed*, 424 U.S. 902 (1976), *rehearing denied*, 434 U.S. 988 (1977) (alleging, in pertinent part, that essay exam not perfect).

In accordance with well-established case law, the Utah Supreme Court thoroughly analyzed Petitioners' claims and concluded that any alleged irregularities in the Bar Exam were insufficient to establish that the applicants were treated in an unfair or arbitrary manner. Under a careful analysis of the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) and *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1012, 111 S. Ct. 580, 112 L. Ed. 2d 585 (1990), the Utah Supreme Court also reasoned that Petitioners enjoyed adequate procedural due process. *See also V-1 Oil Co. v. Dep't of Envtl. Quality*, 939 P.2d 1192, 1996 (Utah 1997).

II. THE UTAH BAR EXAM IS NOT A NORM-REFERENCED TEST

Petitioners' brief argues that the Bar's alleged norm-referenced test violated their rights to both equal protection and due process. Equal protection violations were not specifically raised at the state level except perhaps through

an oblique reference to "constitutional violations." The only specific equal protection argument raised below was in connection with the Bar's reappraisal process, an issue not raised here. As to due process contentions, Petitioners fail to provide a basis in law for their assertions. The cases cited, *In re Reardon*, 378 A.2d 614 (Del. 1977), and *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976), do not support their due process arguments. *Richardson* vaguely addresses equal protection concerns with a particular curving methodology in scoring examinations. *See Richardson* 540 F.2d at 750. *Reardon* states that certain examinees' preference for grading a defective question on a curve would be inconsistent with the Delaware Bar's goal of measuring minimal competence. *See Reardon*, 378 A.2d 614 at 617-18.

A significant portion of Petitioners' claims of constitutional violations stem from their erroneous assumption that the essay portion of the Bar Exam is a norm-referenced test. It is not. A norm-referenced test measures each applicant's performance relative to other applicants tested, e.g. a "curve." The Bar's grading committee evaluates an applicant's answer relative to a model answer that has been prepared prior to grading, not to another applicant's answer. Furthermore, the Utah Supreme Court made a factual finding that the Bar did not employ a "bell curve" in its grading of the examination. *Arnovick* at 1249. Because the Utah State Bar Exam in not a norm-referenced test graded on a curve, Petitioners' constitutional arguments fail.

III. EXTENSIVE DISCOVERY IN BAR EXAM GRIEVANCE PROCEEDINGS IS NOT CONSTITUTIONALLY MANDATED

Petitioners assert that the Bar's refusal to provide certain information deprived them of due process. In reviewing this claim, the Utah Supreme Court noted that pursuant to Rule 11 of its Rules Governing Admission, the Bar made available to Petitioners: (1) the essay questions; (2) the applicant's answers; and (3) model/sample answers for each question. The court also observed that the Bar made available an outline of Bar Exam passing rate data, a copy of the Bar Examination Grievance Appeal Procedure, an article on equating the MBE and essay scores, copies of the ethics question, grading sheets, answers and score summaries, a copy of the *Bar Examiner Grading Handbook*, and a copy of a letter explaining how examinations are scored. The Court concluded that Petitioners had not had been dealt with in an arbitrary or unfair manner.

In comparison, a number of jurisdictions either have no bar exam review process or have a limited review process along with restricted policies relating to the release of information relating to their bar examinations. Absent serious allegations of fraud or violations based on fundamental rights or protected class status, these procedures have repeatedly passed judicial scrutiny. *See, e.g., In re Application of Lamb*, 539 N.W.2d 865 (N.D. 1995), *cert. denied*, 518 U.S. 1008 (1996) (where, in pertinent part, the bar denied applicant evidence he requested); *Bowles v. Askew*, 448 S.E.2d 191 (1994), *cert. denied*, 513 U.S. 1155 (1995) (inspection of bar exam questions and answers refused; *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) (allowing applicant to see exam and petition state

supreme court for review of denial of admission satisfied due process); *In re Mead*, 361 N.E.2d 403 (Mass. 1976), *cert. denied*, 434 U.S. 858 (1977) (applicant's discovery motion for a sampling of both passing and failing bar examination papers denied). *See also Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (where the court found that a procedure for review of a failing grade was not constitutionally required because there was an unqualified right to retake the bar exam).

One of two cases, *In re Application of Peterson*, upon which Petitioners rely upon in support of their due process claim to endless discovery was not based on due process but rather, on a state supreme court's notions of fairness and inherent authority to govern the practice of law. *Peterson*, 459 P.2d 703 (Alaska (1969). The Alaska Supreme Court clearly stated in a subsequent case that, "[a]s in *Peterson*, we are not basing our decision on any constitutional due process claims. We are instead acting 'under our inherent powers governing admission to the practice of law and our general supervisory powers pertaining to admissions procedures'". *In re Application of Obermeyer*, 717 P.2d 383, 390 (Alaska 1986). The other case cited in support of their discovery contention is *Parrish v. B'd of Comm'rs*, 533 F.2d 942 (5th Cir. 1976) where the aggrieved applicants alleged racial discrimination, an allegation clearly not applicable here.

IV. THE BAR IS NOT A STATE AGENCY TO WHICH UTAH'S ADMINISTRATIVE PROCEDURES ACT APPLIES

In a novel argument not presented below, Petitioners contend that the Utah Supreme Court ignored the United States Supreme Court cases of *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959) and *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957), by failing to apply the Utah Administrative Procedures Act ("UAPA") in assessing the Bar's alleged willful violation of various rule provisions. State agencies are under the legislative branch of government and the Bar is under the direction of the Utah Supreme Court. All rules promulgated by the Bar in its regulatory functions are approved by the Utah Supreme Court and are not subject to the rulemaking provisions under the auspices of the Utah State Legislative. As noted above, the Bar is a § 501(c)(6) corporation. *Barnard v. Utah State Bar*, 804 P.2d 526 (1991) discusses the Bar's performance in the regulatory functions of admission to practice law and lawyer discipline and states that those functions did not transform it into a public agency. 804 P.2d at 529-30.

Even if the Bar were a public agency, this Court has held that due process does not require that all governmental decisions comply with standards that assure perfect, error-free determinations. *See, e.g., Mackey v. Montry*, 443 U.S. 1, 5 (1979) (in reviewing state's procedures to a suspend driver's license, Court stated that, "the Due Process Clause has never been constructed to require that the procedures used to guard against an erroneous deprivation of a protectible property or liberty interested be so comprehensive as to preclude any possibility of error").

CONCLUSION

It is axiomatic that this Court's review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari should be granted only for compelling reasons. However, this matter presents no state court opinion that has decided an important federal question that conflicts with the decision of another state court of last resort or of a United States circuit court of appeals. The Petition presents no state court opinion that decided an important question of federal law that should be settled by this Court or an opinion that conflicted with relevant decisions of this Court.

What this case presents are: (1) allegations of erroneous factual findings such as whether the Utah Supreme Court was correct in concluding that Petitioners' grades were not subject to a "bell curve;" (2) new legal theories not raised below that the Utah Administrative Procedures Act should be applied to the Utah State Bar; and (3) an invitation to override a state supreme court's policy decision as to whether the Bar should supply Petitioners with the professional qualifications and training records of members of the Bar Examiner Committee. Ultimately, Petitioners ask this Court to analyze and dictate the Bar's testing methodology based on their preferences, inaccurate assumptions and misapplication of state law. Because this case presents no compelling reason for further review, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — CHART

	APP Score	AVG Score	APP Essay	AVG Essay	APP MBE	AVG MBE
Wanskeer	120.94	147.69	21	28.96	—	144.17
	-18.1%		-27.49%			
Arnovick	126.39	147.69	23	28.96	126	144.17
	-14.4%		-20.58%		-12.6%	
Cox	127.81	147.69	25	28.96	123	144.17
	-13.46%		-13.67%		-14.68%	

APPENDIX B — RECORD OF PROCEEDINGS DATED AND FILED MARCH 2, 2001

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IN THE SUPREME COURT OF THE STATE OF UTAH

In Re:

July 2000 Bar Examination Grievances
(Wansker, Cox and Arnovick)

Record of Proceedings

Case No. 20010136-SC

CORE CHRONOLOGY AND DOCUMENTATION

July 2000 Bar Examination
Administered **(No Tab)** ..... July 25 and 26, 2000

Applicants' Pass/Fail Notification Letters
– *Cox, Arnovick, Wansker* **(Tab 1)** ... September 27, 2000

Applicants' Breakdown of Scores Letters
– *Cox, Arnovick, Wansker* **(Tab 2)** .. October 4 and 16, 2000

Bar Exam Grievance – *Cox* **(Tab 3)** ..... October 26, 2000

Appendix B

Bar Exam Grievance – *Arnovick* **(Tab 4)** .... October 26, 2000

Bar Exam Grievance – *Wansker* **(Tab 5)** ..... October 26, 2000

Deadline For Bar Exam Grievances
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Admissions Committee Findings of Fact and
Recommendation – *Cox* **(Tab 6)** .....December 29, 2000

Admissions Committee Findings of Fact and
Recommendation – *Arnovick* **(Tab 7)** ... December 29, 2000

Admissions Committee Findings of Fact and
Recommendation – *Wansker* **(Tab 8)** ... December 29, 2000

Bar Commission Executive Committee
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Dated this 2nd day of March, 2001.

s/ Katherine A. Fox
Katherine A. Fox, General Counsel
Utah State Bar

Supreme Court, U.S.
FILED
DEC 5 2002

No. 02-629

In the Supreme Court of the United States

IN RE KATHLEEN G. ARNOVICK,
VALERIE L. COX AND
HENRY B. WANSKER,

Petitioners,

v.

UTAH STATE BAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF UTAH

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Respondent Utah State Bar contends that review by this Court is unwarranted; however, the arguments of the Respondent in support of that position are predicated on mischaracterizations of law, fact and indeed, even the Petitioners' arguments. What this case presents to this Court is a decision that contravenes existing United States Supreme Court precedent, creates irreconcilable conflicts of authority among courts of higher jurisdiction and assures substantial and recurrent litigation. In effect, this case is worthy of review.

I. Respondent's Brief In Opposition rests upon conjecture and speculation, rather than evidence of record, in suggesting that this case involves a purely factual dispute.

A. Respondent's speculation as to the attributes of norm-referenced testing does not constitute evidence.

The Brief in Opposition of the Utah State Bar, (hereinafter, "BIO"), purports to define norm-referenced testing and then concludes that the July 2000 Utah Bar Examination was not a norm-referenced test. BIO 6-7. In fact, speculation by the Bar as to the attributes of such testing and its faulty conclusion regarding its own test do not constitute evidence at all, much less proof of the matter asserted.

The Respondent's lack of an evidentiary showing suggests that it eschewed the opportunity to have its test evaluated by an

expert or experts to establish that it passed Constitutional muster as a criterion-referenced test. It certainly failed and refused to review the expert opinion of the Petitioners' psychometrician, apparently because it failed to understand the significance of psychometrics in determining whether or not a test is criterion-referenced and therefore a proper measure of competency. It may not now supplant its lack of a qualified expert's opinion with conjecture, masquerading as proof.

B. The only expert evidence of record, indeed the only evidence of record, is that the July 2000 Utah Bar Examination was a norm-referenced examination.

Respondent presented absolutely no evidence upon the issue of whether the July 2000 Utah Bar Examination was either criterion-referenced or norm-referenced. The Petitioners employed the services of a psychometric expert, one whose job it is to make such determinations, to evaluate the Examination. The opinion of that expert unequivocally established that the Examination was norm-referenced. That opinion is not merely the only expert evidence of record upon the subject, it is the only evidence and it remains uncontraverted. To the extent that the Utah Supreme Court reached a contrary conclusion, it did so without a scintilla of evidence.

C. Notwithstanding the use of model answers by the Utah State Bar, its grading criteria were norm-referenced.

The Respondent suggests in its Brief in Opposition that it used model answers in the grading of the July 2000 Utah Bar Examination and because of this, its grading procedure was criterion-referenced. BIO 7. In fact, this assertion, apart from lacking any evidentiary basis, begs the question of the propriety of the grading methodology actually employed to grade the test. Rule 7-4 of the Respondent's own Rules Governing Admission to the Utah State Bar (hereinafter, "Rules") mandates that norm-referenced grading methodology be used to grade the essay portion of the examination. App. L at 114a. Notwithstanding the use of model answers, the graders were instructed by the Rules to compare each answer to an "average" answer which, by definition, can only be accomplished by reference to the performance of the test-taking group as a whole. This "average" standard is echoed by Section V. F. of the Respondent's Utah Bar Examiner's Committee Grading Handbook (hereinafter, "Handbook"). App. M at 149a-150a. It is also confirmed by the opinion of the Petitioners' psychometric expert (App. O at 165a).

For the Respondent to assert that there is evidence of record, much less expert evidence of record, upon which to ground a factual finding that the July 2000 Utah Bar Examination was a criterion referenced exam which tested for

minimum competency, is clearly erroneous. For the Utah Supreme Court to have drawn either factual or legal conclusions to that effect lacks any rational basis.

II. Respondent's Brief In Opposition rests upon mischaracterizations of the law to suggest that no legal conflict exists.

A. Equal Protection denials occurring when the Utah State Bar violated its own Rules are not remedied by according those aggrieved a "right" to re-take the Utah Bar Examination.

The Respondent asserts that denials of Due Process that may have been suffered by the Petitioners are easily remedied by their unqualified right to re-take the Examination. (BIO 9-10). Assuming *arguendo*, that it were correct in that assertion, the Respondent fails to address separately the merits of the Petitioners' Equal Protection concerns. The Respondent has cited no authority which suggests that re-taking the Examination would constitute an adequate remedy for the denial of Equal Protection. Nor has the Respondent cited authority suggesting that the Petitioners are not entitled to relief if they were denied admission to the Utah State Bar under a defective testing protocol or in the face of multiple, intentional and consequential violations of mandatory Bar Rules while others similarly situated were admitted. The Petitioners believe that no such authority exists and that, in consequence, this question is

among the most worthy of review of those presented.

B. Respondent's subjective opinion that it complied with its Rules regarding its discovery obligations to the Petitioners does not satisfy its Constitutional obligation to accord the Petitioners Due Process.

In the case at bar, the Utah State Bar, acting as agent of the Utah Supreme Court, denied certain of the Petitioners' discovery requests which were necessary to prove some of their allegations of impropriety in the composition, administration and grading of the July 2000 Utah Bar Examination. Thereafter, the Utah Supreme Court, acting in its capacity as the arbiter of a conflict in which it also had the role of principal, deemed a failure of the Petitioner's proof to have occurred. That the Respondent contends it met its minimum obligation to provide discovery as mandated by its Rules is not tantamount to its having met its Constitutional burden to accord the Petitioners Due Process. This is particularly true where the Petitioners' failure of proof was directly related to the Respondent's refusal to provide discovery.

On the one hand, the Respondent suggests that noncompliance with its Rules is excusable (BIO 10) and on the other, it seeks to cloak itself in a form of immunity for having complied with those Rules, if only subjectively

so (BIO 8). The Respondent simply may not have it both ways.

III. Respondent's Brief In Opposition rests upon mischaracterizations of the nature of Petitioners' arguments.

A. The Utah State Bar acted as agent of the Utah Supreme Court in administering the July 2000 Utah Bar Examination and not as a formal state administrative agency, enabled by legislation and entitled to judicial deference.

The Utah Supreme Court characterized the Utah State Bar as its "agent" in its decision in this case. In re Arnovick, 52 P. 3d 1246, 1248 (Utah 2002). At the same time the Utah court was careful to point out that the Bar was not constituted with the dignity of a full-fledged state administrative agency, enabled with its own rule making power and entitled to any judicial deference. *Id.* An entire body of Utah case law, cited in the Petition for Writ of Certiorari, establishes that the Utah appellate courts are strict in their requirements that Utah administrative agencies abide by their rules (State ex rel. Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259, 1263 (Utah 1980)), that a failure to do so is the quintessence of arbitrariness and capriciousness (Id. at 1263), that injury is presumed when such failure occurs (Krantz v. Utah Department of Commerce, Division of

Real Estate and Utah Real Estate Commission, 856 P. 2d 369, 371 (Utah App. 1993)) and that issues as to whether prejudice has occurred must be resolved in favor of those aggrieved (Angell v. Board of Review of the Industrial Commission, 750 P. 2d 611, 613 (Utah App. 1988)). Even the Utah Administrative Code, also cited in the Petition, requires as much. Utah Code Ann., Section 63-46b-16(4)(h)(ii).

The Respondent does not dispute that an administrative agency is constrained by its own rules, but somehow leaps to the conclusion that the Utah State Bar, because it is not a formal administrative agency, need not be so constrained. Logically and legally, an entity acting in an agency capacity such as the Respondent may not rationally be heard to suggest that its actions are not equally as constrained as those actions of other entities constituted with greater dignity. To urge the contrary results in the approval of ungoverned conduct as condemned by this Court and by the appellate courts of Utah. It also implicitly suggests that the Utah Supreme Court, as principal, be allowed to accomplish through the ungoverned conduct of its agent, something it could not accomplish on its own – disregard rules which preclude arbitrariness and capriciousness. Not even the Respondent claims that this would be acceptable, reasonable or rational.

In this case, the Utah State Bar's conduct is subject to mandatory review only by the Utah

Supreme Court. Since the relationship of these entities is one of principal and agent, review of the agent's conduct by the principal cannot logically be characterized as independent. The conduct of the agent should be beyond reproach when that conduct is not truly subject to mandatory, independent judicial review. Indeed, there will be independent judicial review in this case only if the Petition for Writ of Certiorari is granted.

B. Arguments presented in the Petition for Writ of Certiorari were timely asserted.

As noted at page two of the Petition for Writ of Certiorari, the Petitioners asserted their claims for denials of Due Process and Equal Protection in timely fashion and at the administrative level (App. I at 48a-49a, App. J at 64a-65a and App. K at 80a-81a). It has always been the *sine qua non* of the Petitioners' claims that they were denied admission to the Utah State Bar, without a rational basis, while others similarly situated were not. This is the essence of a claim for the denial of Equal Protection. Moreover, the Petitioners have always asserted that the hallmark of the July 2000 Utah Bar Examination was its composition, administration and grading under circumstances of multiple, intentional and substantial violations of mandatory Rules promulgated to circumscribe the Respondent's

conduct. This is the essence of a claim for the denial of Due Process.

The Petitioners point out that the Utah Supreme Court's decision contravenes even its own prior holdings, as well as those of this Court. This does not constitute the assertion of a novel legal theory not timely advanced. Likewise, the use of legal and factual analogy does not fail appellate muster.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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